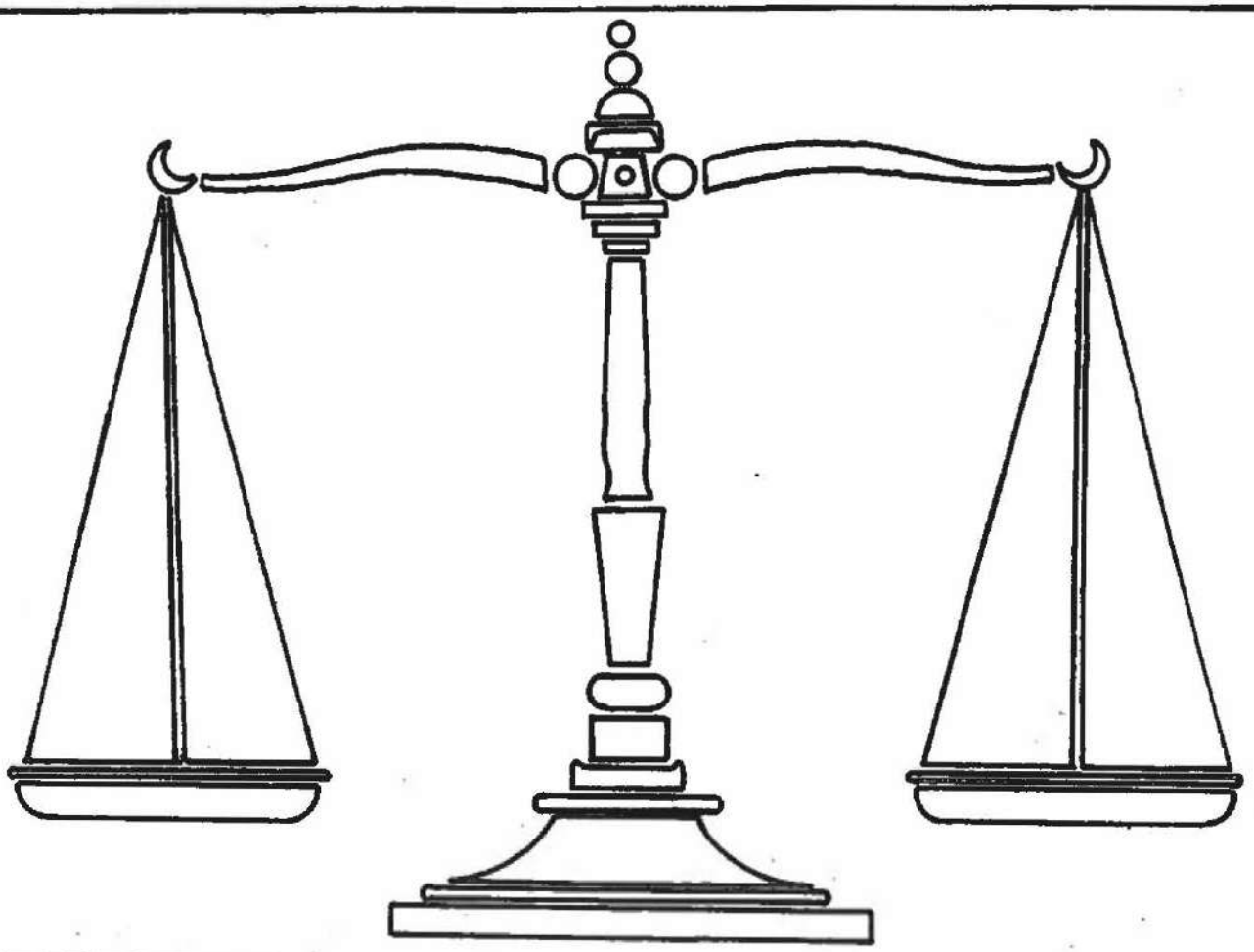
law journal

VOL III organ of the law society of the royal university of malta DEC. 73



CONTENTS

servi legum sumus ut liberi esse possimus.

Law Society,
R.U.M.,
Msida,
Malta.

VOL. III DEC. 1973

LAW JOURNAL

Official organ of the Royal University Law Society

Justice is truth in action

(Disraeli)

EDITORIAL

This edition of the Law Journal comes propitiously towards the end of 1973, and it is felt by the editor that a word in the way of new resolutions, or even a reaffirmation of old ones, would not be altogether out of place.

The position of editor of the Law Journal affords one a particularly interesting vantage point, in that one maintains continuous and direct contact both with the Faculty students who are one's contributors, and with the Law Society which is the Journal's parent body. It would be ostrich-like to deny that far more co-operation is needed between Committee and Students if the Society as a whole is to achieve its declared aims; and in stating this, the editor does not intend to start off slinging a match between Committee and Students: mutual lampooning is to no avail, and hardly worthy of University undergraduates. Students in the Faculty should, on their part, resist the common temptation to criticise and stop there: they should stand up, speak and act to bring their purposes to effect. On the other hand, the Committee should encourage more participation by the students who are its clientele, by organising group work.

Co-operation among Law students can, of course, also be taken to the terrifying extreme of academic parochialism which has been the hall-mark of life at this University for the past few years. It is not suggested here to list the age-long arguments against professional elitism, even when practised in miniature, as it were, by budding lawyers. We must realise, however, that the Law Society should set itself the goal of ridding its adherents of the 'ligi' stigma, and this it should do by opening its horizons within the University, within the country, and, indeed, within the international community.

One of the basic tenets so strongly pronounced by our Faculty Staff is that Law follows man from the cradle to the grave, with the corollary that every situation has its legal consequences. It should be the aim of any Law Society Committee, and of all Law students, to seek this legal aspect in the whole environment around them, and not to telescope this environment into the restrained realms of the 'purely legal'.

CHARLES DE BATTISTA

Special thanks from the Editorial Board go to Anthony Rutter-Giappone and Michael Frendo for the help they offered in the publication of this Journal.

CORRESPONDENCE

LAW is all-pervading. It is the rich veracity of this statement that beckons the legal man today to a new consciousness as to his role in society. And his role is all-pervading too. It is law which maintains a social structure that is not built on the power in the barrel of a gun. In law, might is not right, but right is might. Like any other instrument which yields power, law is also open to abuse. It is the demanding duty of the lawyer or law student to sound his voice and resort to mounting effective pressure, as an individual or as part of a pressure group, to right wrong. His sense of Justice must drive him to see that abuse is substituted by proper, sound use of such a powerful weapon.

The Course of Laws at this university can say with confidence that it has given a valid and consistent contribution to the nation. It has produced true leaders of our country and it has given Malta a Justiciary that could be the pride of any nation. The law students have also had a representative body of long standing which started publishing its organ, 'The Law Journal' in October 1944.

In its first edition, this 'Law Journal', among other things, gave a short list of the activities that the Society had carried out. These included Lectures, Debates, Papers and Moots or debates on supposed cases in a mock court. These 'moots' had been 'chaired' by Prof. V. Caruana, B.Litt., LL.D., and Sir Philip Pullicino, Kt., B.Litt., LL.D. The Editorial also commented: 'It is a sign which augurs well for the future that the Society started off with a flood of activities – monthly lectures, reading of papers, debates, and moots'.

The inescapable question here is: has the good work been kept up? Or has the original enthusiasm dwindled away? Let us have a brief look at the immediate past. Over the past year, various issues – of legal relevance – have arisen both in the national and international fields. It is sad to say that the Law Society has only taken a stand on one issue: the Constitutional Court. And what a weak stand it was! The suspension of such a vital judicial safeguard of the rights of the individual surely deserves more than just a statement in the local press. It deserves a long-term campaign to arouse public opinion and to press the authorities for the restoration of the people's rights. But what about Mozambique? or Chile? or South Africa? or Kreisky's capitulation to terrorism? or Sakarov and Solzhenitzyn? Did not these deserve a stand? Did not Chile set us thinking as to when a coup d'état is constitutional or unconstitutional? Is not the enforcement of 'apartheid' in South Africa a clear example of the abuse of law?

Let us not fall in the doldrums where the least breeze is miraculous. We must take a stand. The alternative is to retreat from the challenge of social involvement. And retreat means extinction. The Law Society must take a leading role. It must show the way to other student bodies by annihilating, once and for all, this perverse notion that politics are anathema. Undoubtedly, in taking any stand on legal issues, the Society would, willy-nilly, involve itself in politics. This would be a test in maturity. The Society must be regardless of the accusations of political bias that are apt to come with the taking of a stand on legal issues, and which accusations, being unjustified, are vivid proofs of mediocrity.

The voice of the law students must be heard or else it will die a tragic anonymous death. It must not only be heard but also listened to. It is only by showing our sense of responsibility by beneficially exploiting our unified potentiality that we can make the Law Society a respected voice of the law students. There is a dire need for an awakening from a sorry state of stagnant perennial inertia.

MICHAEL FRENDO

TRAFFIC LAW REFORM

ANTHONY BARBARA, L.P.

THE traffic problem is an extremely complex one. However, a help in tackling this problem could be the introduction in Malta of the ticket system imposing a fixed penalty on the offender. This system has worked satisfactorily in North America and various European countries, and it seems to me, that there is no reason why it should not prove successful in Malta too.

The ticket system involves the giving of a notice by the traffic policeman at the time of the infringement of the traffic law to the offender, requesting him to pay a fine on the spot or to do so within a time limit. In case the offender wants to contest the offence, the normal summons and court hearing is proceeded with.

This system has the advantages of saving the time and expense of both the policeman and the offenders and reducing the large amount of court cases. Indeed, in view of the fact that a fixed penalty is applied, there is the advantage that in case the offender contests the summons for frivolous reasons he might have to pay a higher fine. After all, what usually happens in Malta is that a large number of offenders admit the summons in Court. These cases, in my view, should never have reached the Court stage. The ticket system would have proved the ideal system in such circumstances.

Of course, there are a number of arguments against the ticket system. These include the fact (a) that fixed penalties may be unfair because they do not distinguish the gravity of the offence (b) that the offender may be unaware of any defence available (c) and that a first and second offender would receive the same treatment.

As regards the first objection, it is obvious that if the offender finds the penalty too stiff he can oppose it and go to Court. The second objection is a very real one but in view of the fact that the offender has a time limit in which to pay he can consult a lawyer in the meantime. In the third case, earlier convictions should be recorded in the driving licence of the individual concerned. In such cases the police officer should not issue a ticket but refer the case to the Court, especially if this was the fourth or fifth traffic offence committed by the offender.

Of course, each system has its own problems. However, it seems to me that the ticket system should be introduced in Malta. Naturally, at first only minor offences should be included, as for example parking offences. Fines should be paid on the spot or within a short time-limit, at the option of the offender. In case of non-payment, court proceedings would be started as soon as possible to avoid delays.

Perhaps, this system will act as a deterrent against potential traffic offenders. Besides, it will allow police officers more time to dedicate to traffic control in the interest of society, rather than spending a lot of time at the law courts where their evidence might, after all, not be required in view of the fact that the offender admits that he infringed the traffic law.

REQUISITES FOR BECOMING A TRADER

MARIO R. BONELLO

MORE often than not, traders devote their time and risk their money with the intention of deriving a profit therefrom; this is what is called 'intromissio speculativa'. 'La figura del commerciante risulta pertanto da questi due elementi: la interposizione nello scambio (di merci, denaro, servigi) e la speculazione, collegati fra essi dal rapporto di causa ad effetto: la interposizione è determinata dallo scopo del guadagno e il guadagno è l'effetto della interposizione' (Bolaffio). Again, 'È commerciante quel fotografo il quale esercisce uno stabilimento fotografico e, quindi, specula sia sull'altrui attività, sia colla rivendita delle materie prime. Ma non può qualificarsi tale il fotografo che, esercitando la sua arte, non tiene alcuno stabilimento, ma loca meramente la sua opera.' (Emm. Darmanin no. vs. C. Giglio; Vol. XXVII, Pt. I, P. 958). Section 4 of the Commercial Code defines a trader as 'any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership'. It is of the utmost importance to distinguish between a trader and a non-trader, for a trader has certain rights and duties at law, which are not applicable to a non-trader. Yet a trader does not acquire a juridical status, but a *social* one.

Our law has not imposed any formality or the necessity of registration for a person to become a trader. It has adopted in this respect a realistic point of view depending on facts, that is, the exercise of acts of trade. 'Biex wieħed ikun kummerċjant il-liġi trid li ħuwa jagħmel, bi professjoni, u b'ismu, atti ta' kummerċ. U mhux biżżejjed, biex jistabilixxi definitivament il-kwalità ta' kummerċjant, il-fatt li wieħed jassumi dik il-kwalifika fl-attijiet u l-kuntrattazzjonijiet li huwa jagħmel.' (C. Cutajar vs. S. Camilleri, Vol. 33, Pt. III, P. 466). It may be rightly assumed that Section 4 is one of public policy. It should also be noticed that a very wide discretion is left to the Courts in deciding what constitutes exercise of acts of trade, what is meant by profession, and how many acts of trade are required. The answer to these questions may vary according to each particular case.

First of all, then, the law requires the person who is to become a trader to *exercise objective acts of trade*, that is those acts enumerated in Section 5. The actual exercise of these acts is required and it should appear therefrom that the person performing them is assuming in respect of third parties a direct, personal and unlimited liability for any consequence deriving from such acts. It may also be pointed out that acts of brokerage, though not included among the objective acts of trade by the law, have been considered to be so by tradition. Such exercise of acts of trade must be repeated for a number of times, though they need not be the same acts of trade which are so repeated. This requisite is a question of fact which may vary and which may have to be decided by the Courts in case of controversy. The acts of trade need not even refer to the same line of trade. The number of such acts of trade may vary from case to case, so that while in some cases a number of them are essential, in other cases, such as in the case of an undertaking, one would be sufficient.

Such exercise of objective acts of trade need not be performed by the individual who is to become a trader 'in persona', but he may appoint agents to act instead of him; but in such a case, the acts are to be performed in the name of the principal. The said exercise of objective acts of trade must be performed with the *intention of speculation*; 'finis mercatorum est lucrum!' So that a person, who in the management of his affairs frequently makes use of bills of exchange (an objective act of trade) does not become a trader if he does not have any intention of making a profit.

The law requires as a further element for becoming a trader that the exercise of acts of trade be *by profession*, that is, that at least they are to form the primary means of living and a constant source of income. 'Il compiere atti di commercio, anche abitualmente, non attribuisce a chi li effetua la qualità di commerciante se l'esercizio di quelli atti non è fatto per professione.' (Bolaffio). The person who is to become a trader must therefore devote his services to trade in such a way that it becomes his normal and permanent occupation, though it need not be his only or his principal occupation, 'perchè commerciante non è se non chi assume una responsabilità illimitata per gli atti di commercio (oggettivi) conchiusi professionalmente nel suo nome commerciale.' (Bolaffio). The draft of the French Commercial Code contained the following definition of a trader: 'A person who notoriously exercises acts of trade as his principal profession'. But when the final text was passed the words 'notoriously' and 'principal' were deleted. So too, in our law the notoriety of the objective acts of trade is not a necessary element, for the objectivity of the acts of trade is not dependent on their publicity. So a person who exercises acts of trade in secret would still become a trader, though obviously evidence to prove that he has acquired the status of a trader may be more difficult to produce. It is a known fact that some persons exercise trade secretly, because of their holding some employment with the Government or for some other reason, but this does not mean that they do not become traders if all the requisites for so becoming exist. 'Il-fatt li kummerċjant ikollu l-liċenza relativa għall-kummerċ tiegħu f'isem il-mara mħabba l-fatt li huwa impjegat ma jneħħilux il-kwalità ta' kummerċjant; għax billi huwa jeżerċita l-kummerċ okkultament u ma jagħmelx mill-kummerċ l-uniku mezz tas-sussistenza tiegħu, huwa jibqa' xorta waħda kummerċjant.'

The third requisite for becoming a trader is that the person who exercises objective acts of trade by profession does so *in his own name*. So that a director or representative of a business is not a trader. He must assume vis-a-vis third parties full responsability of the transactions, performed by him. The law does not say that he must also act 'on his own behalf'. So a Commission Merchant, who transacts business in his own name, but for or on behalf of his principal still becomes a trader. As a general rule, of course, a person who acts in his own name acts also on his own behalf. What is really required by the law in this respect is that the person who actually transacts business in his name assumes a personal and direct liability in respect of third parties. Some text-writers, such as Bolaffio, argue that the phrase 'in his own name' implies that the act of trade must be performed also 'on his behalf'. Vivante, Goldschmidt and others, however, rightly disagree.

The law only requires the above three requisites for a person to become a trader. 'I tre requisiti ... debbono concorrere ed essere concomitanti per far sorgere la figura giuridica del commerciante. La mancanza di uno solo di essi sarebbe sufficiente per fare escludere tale qualità'. (Pipia). No formalities whatsoever are imposed. Act No. XXX of 1927 introduced the Register of Traders, but registration is optional and not compulsory; as a result, it seems, that traders have tacitly agreed not to make use of this Register of Traders. In Italy, 'l'iscrizione obbligatoria nel registro non basta da sola ad attribuire la qualità di commerciante a chi effettivamente non lo sia; ne la ommessa iscrizione fa perdere la qualità di commerciante a chi in realtà lo è' (Bolaffio).

One must distinguish between incompatibility to trade and incapacity to trade. In the case of incompatibility, the person could still become a trader, but he would make himself liable to certain sanctions imposed by law or otherwise. In the case of incapacity to trade, on the other hand, the person who is incapable cannot acquire the status of a trader.

Furthermore the law provides in Sec. 4 that the term 'Trader' shall include any commercial partnership. A Commercial Part-

nership acquires the status of a trader the very moment a Certificate of Registration is issued under the Commercial Partnerships Ordinance of 1962. It becomes a trader independently of the exercise of acts of trade. 'Le società commerciali diversificano dagli altri commercianti, persone fisiche o giuridiche, in ciò: che come scrive il Mancini nella sua Relazione – costituite le società commerciali, le medesime, *fin dal momento della loro legale costituzione*, sono persone rivestite della qualità di commercianti, prima ancora e senza richiedere da parte di questi enti collettivi una prova dell'esercizio abituale del commercio.' The object for which the commercial partnership is set up takes the place of the actual exercise of objective acts of trade and this is an exception to the general rule. 'Ciò che dà alla società l'impronta commerciale è l'oggetto sul quale spiega la sua operosità'. (Bolaffio).

But what about the partners of a Commercial Partnership? Do they acquire the status of a trader? As regards *limited partners*, who have their liability limited to their amount of their share in the partnership (all partners in a Limited Liability Company and at least one partner in a partnership 'en commandite') all text-writers agree that they do *not* become traders. But conflicting views exist as regards *general partners*, who are liable for the losses of the partnership in an unlimited way (all partners in a partnership 'en nom colectiff' and at least one partner in a partnership 'en commandite'). Those who argue that general partners become traders come to this conclusion because in the event of bankruptcy of the partnership the general partners also become bankrupt, and as only traders can be declared bankrupt so it follows that the general partners are by law considered to be traders. Our Courts tend to favour this view, though the matter 'ut sic' has never as yet formed the object of a decision.

Yet the better view today seems to be that general partners do *not* become traders; it is the partnership as such that is a trader, for it is considered by law as a 'juridica persona', subject to all the rights and duties of traders; a commercial partnership has its own name, a legal domicile, a capital and a will of its own; it is by law considered as a fictitious person. Furthermore, if general partners become traders, they would do so from the moment the said Certificate of Registration is issued and this would make them become traders prior to and independently of the exercise of acts of trade, which as we have seen is a necessary element for becoming a trader, which exception can in no way be justified. Again if they do become traders, what trade books would they be bound to keep? The bankruptcy of the general partner should not be regarded as resulting from the fact that he is a trader, but it must be regarded as a *sanction* established by law in order to protect the partnership's creditors, and therefore as an exception to the general rule. A Commercial Partnership does not, therefore communicate at the general partners its status of a trader; but in the event of bankruptcy the status of bankruptcy is conveyed to the general partners in the sole interest of the partnership's creditors.

THE LEGAL PROCURATOR

A Study of the Historical Background, Status and Functions of the Profession

MR. JUSTICE M. CARUANA CURRAN, LL.D.

THE designation 'legal procurator' as known to us appears to have crept gradually into use towards the closing years of the eighteenth or in the first quarter of the nineteenth century. It may, in fact, be stated with some certainty that no reference to procurators as 'legal' is to be found in the Code de Rohan of Diritto Municipale di Malta which was promulgated in 1784 and as closely as it seems possible to ascertain, the earliest evidence of legislative recognition of this professional title is to be found in Proclamation No. XII of October 15, 1827.

Prior to this Proclamation a member of this branch of the legal profession in these Islands was known simply as a 'procuratore' or 'curiale', the latter name conveying, it appears, not so much the idea of representation of a client, as is suggested by the former term, but rather one who moves litigation in Court. Gradually the former term became more and more widely used to the extent that the word 'curiale' disappeared from current legal parlance. In this connection it may be interesting to note that though the term 'legal procurator' is now strongly embedded in the language not only of the Courts but also of the people, and though it has not been claimed for them that our legal procurators enjoy the status of solicitors in England, it is perhaps due only to one of these strange twists of history for which there is no accounting that the members of the Maltese profession are not called by the same name as their colleagues in England. Indeed we find in the Leggi e Costituzioni Prammaticali of Grandmaster Manoel de Vilhena (promulgated in 1723 and the first code to the printed in Malta) in Title VII para. 3 a provision to the effect that there had to be exposed in every tribunal a list of all 'Dottari e Sollecitatori approvati'. The word 'sollecitatori' in this context may be taken as synonymous with 'procuratori', for the next section (para. 4) debars 'Avvocati Procuratori e Sollecitatori' from entering into any agreement with their clients regarding causes entrusted to them; while any remaining doubt on this score is easily banished by para. XXVI of Title XII which, after laying down that all executive warrants had to be signed by an advocate (giurisperito) went on to concede to 'procuratori e sollecitatori approvati' the rights to obtain such warrants in cases of contumacy or cases involving sums not exceeding five 'onze', which in present day currency would be equivalent to one pound sterling. In the Code de Rohan we do not come across the term 'sollecitatore' but both 'procuratore' and 'curiale' are maintained therein.

I – INTRODUCTION: AN ANCIENT INSTITUTION

As to the time to which the existence of this profession goes back, Sir Antonio Micallef, in the admirable comments to the Code de Rohan which he published in 1843, (Vol. I, p. 158) state that we have here a very ancient institution, and he points out that it must have existed even prior to the promulgation of the Prammatiche of Grandmasters Carafa (1681) and Lascaris (1640). This is desumed from Title 1 of the Prammatiche (or Constitutions) of Lascaris (MS No. 148 Public Library) which deals with the Mode of Proceeding in Civil Causes and contains a provision roughly similar to para. XXVI of Title XII of the Costituzioni di Manoel (supra) regarding the signature of executive warrants, here also the term 'sollecitatore' and 'procuratore' being used synonymously. Further references to the profession are to be found in the Prammatiche of Carafa (MS No. 150 Public Library), and in the Consolato di Mare di Mal-

ta of Grandmaster Perellos, promulgated in 1697 (MS No. 392 Public Library). Thus the profession may safely claim to have served the community for well over three centuries and this is no doubt a circumstance which neither the members of the profession itself, in upholding its dignity, nor the authorities, in applying such reforms as may be judged consonant with the times, can afford to overlook.

1. *The element of representation*

And as to the functions and status of legal procurators in our system of law, while only a brief outline may be attempted here, it is not hazardous to start from the fundamental point that a procurator is generally one who acts for another. In Roman Law it was recognised that even in the solemn juridical transaction of the 'iudicium' it was possible, as in any private transaction, for one person to be represented by someone else, and the term 'procurator ad litem' was applied to a person who maintained and defended an action on behalf of another. Thus there arose side by side with the representation of the tutor and of the curator, that of the 'procurator', whether 'omnium bonorum' or nominated for the occasion, such as the 'procurator ad litem' who eventually came to be placed almost on a level with the older institution of the 'cognitor'. Hence the word procurator has, in different degrees in different countries, continued to be used in codes which, like ours, bear the stamp of the Roman civil law, to denote court officials having more or less a representative character. The term is not unknown even in other countries. In Scotland the term 'procurator' still means a 'law agent' practising in the inferior courts, the Faculty of Procurators in Glasgow having a considerable membership. In England a practitioner in the ecclesiastical and admiralty courts is still called a 'proc'tor', which is after all only a syncopated variant of the term so familiar to us.

Tnis characteristic of representation goes some way, though not all, in determining the main functions of the legal procurators in our Courts. The legal relationship between legal procurator and client is similar to that between advocate and client, that is, juridically speaking it is a relationship quite 'sui generis', though it partakes both of the contract of mandate (involving representation) and of the contract 'locatio operum' (not involving representation).

The theory of the quantum of representation to be found in this juridical relationship was clearly expounded by the Court of Appeal in re Dr. Alf. Mercieca et vs. F. Bonaci pro. et noe. (per R.F. Ganado, E. Ganado and L.A. Camilleri JJ., Law Reports Vol. XXX, 1, 625) in which it was held that the employment by a trader of an advocate and legal procurator to defend him in a cause before the Commercial Court did not render the two legal practitioners persons auxiliary to the trader, in spite of the mandate conferred upon them. However much this institute has lost of its representative character there seem to be some good grounds for holding that procurators came into existence originally as representatives or agents of their client for the purpose of instituting and proceeding with a law-suit. Title XII of the Costituzioni di Manoel, which dealt with procedure and was modelled on the 'rito siculo', laid down at para. 12 that no person was to be admitted to file any written pleading or other judicial act, whether on behalf of plaintiff or defendant, unless he had exhibited his appointment as agent or procurator for that purpose. And in the preamble to Proclamation No. XII of October 15, 1872, the first attempt made under British rule to legislate for the profession, we find that one of the main objects of the law was that of providing 'for the appointment of skilful and honest Procurators to manage suits at law for those persons who have not leisure or ability to conduct their own legal concerns'.

II – Functions and Status of the Profession

Of this representative character there are still sufficient traces in our law and

procedure to warrant its being described as perhaps the main feature of the juridical relationship between legal procurator and client. Except, however, in so far as concerns the courts of inferior jurisdiction and the court of voluntary jurisdiction to which his right of audience is limited, the legal procurator must work under the direction and instructions of the advocate engaged by the client, and we do not have therefore the same relations as exist in England between solicitor and client or solicitor and barrister, the latter in that country being not only engaged but also briefed (i.e. has a summary of the facts and law-points of a case drawn up by him) by the former.

2. *Evidence before the Royal Commission*

The Royal Commission of 1911, which enquired, inter alia, into the judicial administration of these Islands, was evidently interested in the status of the profession and perhaps it would be difficult to provide a clearer and more concise illustration of what that status is than by reproducing some questions put to the Hon. Dr. Vincent Frendo Azzopardi, (later Sir Vincent Frendo Azzopardi) then Crown Advocate, and the latter's replies thereto:

'10,031. Now will you tell us about the procurators?'

The local solicitors are styled 'legal procurators'. Their status is different from that of the English solicitors. Legal procurators are admitted to the practice of their profession by a Governor's warrant, as in the case of advocates. The conditions for obtaining the warrant, are mutatis mutandis, the same as in the case of advocates. The legal procurators are not required to go through a regular course of legal studies or to obtain a university degree in law. They have to pursue a special course of study of the rudiments of civil and criminal law and of the practice of the Courts. The principal duties of the legal procurators are to assist the advocate with whom they are retained, in the proceedings of the case: to file written pleadings in the Registry on behalf of the clients, and to perform generally other services in connection with the preparation of cases by the advocates. Legal procurators are admitted to plead in the Inferior Courts. They are entitled to the same privileges, and are subject to the same disqualifications, as the advocates. Their fees in civil matters are regulated by the 'tariffi' annexed to the Laws of Organization and Civil Procedure, and in criminal matters, as in the case of advocates:

'10,033. You say that one of the duties of the procurator is to assist the counsel in the proceedings. Does that include what we call in England getting up his brief for him?'

No, that is done by the advocate, generally speaking. In some cases it may be done by the procurators when they are able to help in that line.

'10,034. But that is a question between the procurator and the advocate?'

Yes, exactly. It is not part of their duties'.

(Minutes of Evidence of the Royal Commission of 1911, H.M. Stationery Office, 1912, page 276)

The Court of Appeal in re Tabone vs. Farrugia et (per A. Dingli C.J., Naudi and Xuereb J.J., Law Reports, Vol. XI p. 506) put the situation this way: 'In law, the functions of the legal procurator are to do for his constituent, in the business committed to him, all that which according to law appertains to his profession under the direction of the advocate (where one has been engaged) and this mandate has no limits other than those flowing from the legal procurator's professional duties (Sec. 1635, Ord. VII of 1868, now Sec. 1970 of the Civil Code)'. This section states that where a person has been employed to do some thing in the ordinary course of his profession or calling, without any express limitation of power, he shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by him. Thus, in the case above-mentioned, the

Court of Appeal ruled that according to Sec. 208 of the Laws of Organization and Civil Procedure) (now sec. 181(1) of the Code of Organization and Civil Procedure) the legal procurator for respondent must accept service of an appeal petition in continuation of the carrying out of the mandate (unless already revoked) in virtue of which he filed the act instituting the law-suit.

3. *Duties in Superior Courts*

In the Superior Courts the main functions of the legal procurator is to assist the advocate, to file the written pleadings, and generally to make himself useful by attending sittings, obtaining adjournments where necessary, and to await on the Court in the absence of counsel. A curious case in connection with this last-mentioned point is reported in Vol. XX, Part I, p. 59 of the Law Reports. In giving judgement, the court of first instance had decided that no fee should be taxed in favour of the legal procurator for the plaintiff as, on the cause being called, the plaintiff's counsel being also absent, the legal procurator did not appear 'to request an adjournment to do anything else that might be required of him'. An appeal was entered and a doubt arose as to whether the judgement was appealable, it being contended that the judgement was given in terms of the provisions of the then Title XVI of Book III of the Laws of Organization and Civil Procedure (Respect due to the Court). The judgement was held to be appealable and actually reversed on the grounds that (a) even if the legal procurator's omission was a contempt of court it was punishable by ammenda, multa or detention; (b) the said Title did not provide for the forfeiture of fees, nor did it contemplate such an omission by a legal procurator. The judgement, in spite of its reversal, is useful because it states in no uncertain manner a duty which no legal procurator working in the Superior Courts should transgress.

In the Superior Courts the right of the legal procurators to file the written pleadings in a case (Sec. 180(b), Code of Organization and Civil Procedure) has now come to be considered as one of his main duties, for an advocate may not file such pleadings in the Registry, and in the absence of a legal procurator, the client would, as a general rule, have to go to the Court himself for that purpose. Hence the engagement of a legal procurator has become, at least in practice, an almost unavoidable necessity. The right of an advocate to employ a legal procurator without the latter being directly engaged by the client was challenged in Dr. Ant. Caruana vs. Scerri (Law Reports, Vol. XXVI, Part I, p. 533, June 18, 1926) but the Court of Appeal (Mercieca C.J., Agius and L. Camilleri J.J.) held that according to our system of law the party who entrusts an advocate with his defence in a law-suit implicitly entrusts him also with the duty of employing a legal procurator, unless he has shown the advocate a wish to the contrary. The assistance of the legal procurator, the Court went on to say, is indispensable to the advocate in the filing of judicial acts, and the client who allows such acts to be filed by the legal procurator tacitly recognises the services rendered to him by the latter even though there have been no direct relations between them.

The signature of the legal procurator, once his services have been taken up, is required on all written pleadings together with that of the advocate, barring in commercial matters where they may be signed by the Parties (Section 178, Code of Organization and Civil Procedure). It may be interesting to compare the present state of the law on this subject with somewhat corresponding provisions of our past laws. The Code de Rohan (Book I, Chap. 7, para. 5) provided that the Maestro Notaro (the former title of the present day Registrar) of the Tribunale della Gran Corte della Castellania could not allow the filing of any act which was not signed by an advocate or by a 'curiale abilitato' and a similar duty was imposed on the Maestro d'atti of the Supremo Magistrato di Giustizia by para. 10 of Chap. XIII of Book I of the same Code. And as to commercial matters

it is well-known that though under the Consolato di Mare di Malta of Perellos, which created a special tribunal for the determination of mercantile disputes, parties could be assisted by advocates or by 'procuratori matricollati'. (Title II, Chap. XVII) the chapters appended subsequently to 1697 established severe penalties against advocates and legal procurators who held up the speedy determination of a cause (Vide Riniero Zeno, il Consolato di Mare di Malta, Casa Editrice Jovene, Naples, 1936, pp. 18, 44, 57). This was perhaps logical for a Court which had to proceed 'sine strepitu et figura iudicii'. Title XXVIII, para. 3 of the Costituzioni di Manoel, which also dealt with the Consolato and is modelled on the law of Perellos, went even further and prohibited advocates and legal procurators from taking part in proceedings before the Consolato without the special permission of the Grandmaster, and the same provision was repeated in the Code de Rohan (Book XI, Chap. I, para. 27).

An important part of the duties of a legal procurator in the Superior Courts is that he may, (and most legal procurators serve for some period in this capacity) be appointed by the Governor, in terms of Section 87 of the Code of Organization and Civil procedure, to perform in those Courts the duties of an official curator and of a legal procurator for the poor. In the former capacity he has, jointly with an advocate, to appear in and defend proceedings in the interest of a variety of persons, such as absent or interdicted persons, minors not legally represented, imbecils, uncertain persons entitled to succeed to a vacant inheritance, and others (Sec. 928, Code of Organization and Civil procedure). His responsibilities in this capacity may render him personally liable to the party represented by him and his duties are clearly set forth at Section 936 of the abovementioned Code, which provides that he has (a) to obtain for the advocate such information as to facts as the advocate shall require, (b) to file the written pleadings, (c) to be present at the hearings and (d) to afford all other necessary assistance to the advocate. Every aspiring legal procurator however, should make these aims his target not only in the official capacity above-mentioned but also when he is privately engaged.

It has been stated above that the legal procurator works under the direction and advice of the advocate. There is, semble, one case in which a legal procurator may dissent from the opinion of his advocate and this exception occurs in the case of his appointment by the court of voluntary jurisdiction under Section 502 of the Code of Organization and Civil Procedure in proceedings for the disencumberment of immovable property by the procedure of edicts (Law Reports, Vol. VII, p. 82, in re Neg. Vzo. Bugeja vs. Not. A.A. Fabri, H.M. Civil Court First Hall, per F. Pullicino J., April 18, 1874).

The only court of superior jurisdiction before which legal procurators have audience is the Second Hall of H.M. Civil Court, which is the court of voluntary jurisdiction, and as to the signature of applications filed in this court the law states (Sec. 470(2). Code of Organization and Civil Procedure) that they may be signed by the applicant himself, or by an advocate, notary or legal procurator.

4. *Duties in Inferior Courts*

Apart from such duties as he may take up in the Superior Courts a legal procurator is an independent practitioner in his own right in the Inferior Courts, that is, the Courts of Magistrates of Judicial Police. Indeed though advocates are by no means precluded from appearing before these Courts, and they do in fact frequently appear there the general practice is for litigants whether in civil or criminal matters brought before those courts to engage a legal procurator.

III – Qualifications

Having traced some, if not all, of the historical background of this profession, its status, and its duties in our system of law, it would not appear irrelevant to enquire into the qualifications for its exercise, and to compare these qualifications

with those required of advocates. In the Costituzione di Manoel and in the Code de Rohan its members were often referred to as 'procuratori o curiali approvati'. There seems to be no doubt, therefore, that even in those days the profession could not, at least in theory, be practised except by those who were in possession of certain qualifications, which entitled them to a licence or warrant to that end. This licence or warrant was called the 'matricola', a word which denoted a diploma given to those who were registered as entitled to exercise an act or a profession, and hence they were also known as 'procuratori matricolati'. (Sir Antonio Micallef, loc. cit.)

What the qualifications for the exercise of the profession were is not very clear, though some light may be shed thereon. The Costituzioni di Manoel contained a Title (VIII) called 'Of Advocates and Procurators', and the first two sections thereof dealt with the qualifications of Doctors of Laws. From these provisions it appears that advocates had to obtain a warrant from the Grandmaster, and for this purpose it was required that after having qualified as a Doctor of Laws it was also necessary for the advocate (a) to register his 'privilegio' in the Gran Corte della Castellania; (b) to have practised continuously for two years with a senior advocate; and (c) to take the oath prescribed for advocates at Title I, para. XIV, before the Castellano. Unfortunately the third section quite abruptly mentions 'sollecitatori approvati' without saying what 'approvati' really meant, and there does not appear to be any elucidation of this point in any other part of Manoel's Constitutions.

A partial solution is offered by Title VII, para. 7 of the Prammatiche of Caraffa which laid down that the only persons who were entitled to carry out the 'procura ad lites' were those who were 'matricolati con gli altri procuratori o sollecitatori ed abilitati da Noi' (i.e. by the Grandmaster). Even so this provision did not indicate the qualifications required for the Grandmaster's approval.

The Code de Rohan was at least more explicit in this regard Chapter XL of Book I (also entitled 'of Advocates and Procurators') providing at para. XIX that any person seeking to be allowed to act as a procurator in the tribunals had to be of known honesty (nota probità) and sufficiently experienced in judicial procedure and in the compilation of records. The qualifications required of advocates by this Code may be briefly summed up in the words of Debono (Sommario della Legislazione in Malta, p. 241) as (a) knowledge of the civil canon and statutory laws, (b) court practice, (c) honesty and (d) warrant of the Grandmaster.

By 1827, evidently the situation in regard to the observance of the law as to the qualifications of legal procurators had deteriorated so much so that on October 15 of that year a Proclamation was published for the purpose of regulating the conditions under which the profession could be exercised. Both its preamble and its substantive part makes interesting reading. The first part of the preamble has already been quoted, but the preamble ended by saying that the Lieutenant-Governor was 'resolved to put a stop to the injurious practices of a class of men, who, without any professional skill or character, make a trade of promoting litigation, and live by harassing others with frivolous and vexatious actions or unjust defences'. The Proclamation then provided that:

1. No person would be allowed to sue out any warrant or other writ as Procurator in any of the Superior Courts or before the Supreme Council of Justice, unless he were in possession of a licence from the Head of the Government to practise generally in the Courts or Council as a legal procurator, or unless he had received from the Government an official licence to act as such in a particular cause.

2. Permission to practice generally as a legal procurator was to be granted to those who were of known honesty, furnished with sufficient experience in judicial proceedings and competently skilled in the English language.

3. The general licence under No. 1 was valid also for the Inferior Courts but these

Courts could grant special licences for particular causes coming before them to persons of known probity and sufficiently experienced in judicial proceedings.

4. Any Court had power (a) to suspend the licence of any legal procurator, in so far as it related to the same Court, on proof of fraud or malpractice in the profession, or gross negligence or incapacity; (b) to order the legal procurator to pay costs to his client in case of neglect and to the opposite party for vexatious conduct; and (c) to report the occurrence to the Government.

5. The offence of acting as a legal procurator without a licence was punishable by a penalty of 100 Scudi.

6. The final clause dealt with fees.

The Proclamation has to be read together with a Notification of June 18, 1814, whereby applications for the warrant or licence to practise the legal profession in any of its branches had to be made to the Governor and to be accompanied by a certificate signed by two judges regarding the applicant's character and ability, a provision which we still find in our law.

Knowledge of the English language had already been provided for by a minute published in the Government Gazette of May 17, 1820 and by a Proclamation of October 1, 1827, but by a subsequent Proclamation dated October 25, 1830, it was declared that, without prejudice to the Proclamation of October 15, 1827, the Head of the Government could grant the necessary licence independently of the knowledge of this language.

In substance this Proclamation brought little or no change to the qualifications as set out in the Code de Rohan, but emphasis was placed on the control and discipline of the profession.

It is also worth mentioning that by means of a letter from the Government dated November 23, 1827, the Registrars of the Courts were informed that the provisions of the Proclamation were not to be interpreted in such a way as to exclude from appearing on behalf of their constituents and principals the mandatories of absent parties, the legitimate representatives of minors, the administrators of 'luoghi pii' and others entitled by law to represent their constituents in judicial proceedings. This letter is relevant to the present subject not, of course, for its legislative value, which is nil, but as it lends strength to what has been stated above in the sense that, in its beginnings, the profession found its main element, if not its raison d'etre in the idea of representation.

Writing at a time when this Proclamation was the only law governing the qualifications of legal procurators, (in fact it was not repealed until Ordinance No. IV of 1854) Sir Antonio Micallef (op. cit. p. 160), states than on obtaining the Governor's licence for the practice of their profession legal procurators were, like advocates, to take the Oaths of Allegiance and of Office before the President of the Court of Appeal. The reference by Micallef to the Oath of Allegiance clearly indicates an innovation brought about under British rule, for under the Costituzioni di Manoel and the Code de Rohan there was only the oath 'Formula Juramenti Praestandi Per DD. Advocatus', the wording of which referred only to professional duties and this was not administered to procurators. Debono (loc. cit.) makes no reference to the need of taking any oath by procurators under those laws. It is perhaps strange that in the General Constitution of all the Superior Courts of Justice, brought into effect under the then Governor, Sir Thomas Maitland, that great contributor towards the advancement of the administration of justice in these Islands, by Proclamation No. XV of May 25, 1814, there is no mention of these oaths. But in the Constitution of the Commercial Court, which came into force, together with that of the other Courts, by virtue of the same Proclamation, we find that para. 7 provided as follows:

'All Advocates, Attornies, (procuratori in the Italian text) and other officers of the Court, shall, on their appointment to their said offices, take the Oath of Allegiance and the following oath for the due execution of their respective duties ...'

The Oath of Office was worded in substantially the same manner as the oath nowadays prescribed by section 84 of the Code of Organization and Civil Procedure.

In his comparison of the status of advocates with that of legal procurators in his time Sir Antonio Micallef (loc. cit.) states that they both occupied offices of a public rather than a private nature. Today we still find this principle enunciated in Section 31 of the Code of Organization and Civil Procedure which provides that both advocates and legal procurators when they appear before the Superior or Inferior Courts shall be deemed to be officers of the Court. He also points out these differences: (a) that legal procurators, unlike advocates, could agree with their clients regarding the fees payable to them while advocates could not demand more than was taxable to them. Section 80 of the Code of Organization and Civil Procedure provides also that an advocate may not by agreement fix his fees at an amount higher or lower than that fixed in the Code, saying when for some particular purpose of the contending party the action is restricted to an interest smaller than that on which the decision will have a bearing. This section, however, does not mention legal procurators; (b) that advocates wore a silk gown and legal procurators woollen ones. Nowadays legal procurators do not wear a gown.

(to be continued)

THE 'RATIO' BEHIND ARTICLE 2049 OF THE ITALIAN CIVIL CODE

ALFRED GRECH

TRADITIONALLY, the responsibility of the Master for damages caused by his servant has been an acknowledged principle of Civil Law. The basis of this responsibility is the Roman Law principle 'qui facit per alias facit per se' which has been reproduced in modern times, subject to exigencies of time and place. The Maltese Civil Code embodies the principle in section 1080; the English system accepts it under the doctrine of vicarious liability, and the Italian Code of 1865 followed the Code Napoleon in a similar provision in section 1153. The 1942 Civil Code says much the same thing in article 2049: 'I padroni e i committenti sono responsabili per i danni arrecati dal fatto illecito dei loro domestici e commessi nell'esercizio delle incombenze a cui sono adibiti'. Materially there is no difference between section 1153(s) of the older Code and the provision of section 2049. The difference is one of principle in that the responsibility of Masters and Employers, founded on a different concept than that of parents and tutors is dealt with in a separate section.

The basis of this liability is that Masters and Employers are responsible for damages caused by their servants and employees independently of their personal fault. This principle carries an amount of rigidity because whereas the provisions immediately preceding section 2049 contemplate the right of those responsible for those under their care, to prove 'di non aver potuto impedire il fatto', no such reservation is admitted under section 2049. From one point of view, this is a form of indirect responsibility which arises from the actions of a different person, beyond his legitimate sphere of action, and as such, therefore, delictual. But there are some writers who consider such responsibility as Direct. To Paladini (Responsabilità civile e penalé p. 36-37) the fact that a particular act by the subordinate produces ipso facto the responsibility of the principal, is to be considered direct responsibility ex hypotesi. The difference between the two points of view seems only to be one of terminology and as such immaterial for our present purpose.

The important thing here is the responsibility without fault. It was once thought that this responsibility was based on the absolute presumption iuris et de iure which embraced an abstract concept of faith not in conformity with reality. But where fault cannot be proved liability is not to arise for presumed fault: 'Una colpa che è presunta', says Cogliola 'è una contradizione in se stessa perchè si viene a dire che colpa nel committente non c'è', ma che la legge la presume per utilità sociale; e allora non è meglio trovare in questa utilità la ragione della legge senza ricorrere a concetti fittizii?'

A variation of this absolute presumption was that of Culpa in Eligendo vel Vigilando. This doctrine was expounded by Baudrio-Lecautinerie and Giorgio and is in fact the one accepted by our Code: 'Where a person for any Work or service whatsoever employs another person who is incompetent, or whom he has no reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service cause to others' section 1080. In this case, Masters and Employers who are free to choose servants and employees are held liable on the basis of their negligence in the exercise of their choice, that is to say on the basis of 'Culpa in Eligendo'. Such a fault is presumed iuris et de iure without the possibility of proof to the contrary.

Not so however with regard to Parents and Tutors who are responsible for their wards. In their case the presumption is

only iuris tantum and liability exists insofar as they cannot prove 'di non aver potuto impedire il danno'.

Contrary to what may appear at first sight, the section under discussion although faithful to the traditional concept of Indirect Responsibility departs to a considerable extent from the doctrine of *No Responsibility without fault.* Certainly, both doctrine and Case Law have been inclined to accept the absolute presumption of fault based on the wrong choice of the servant or employee. But this presumption does not account for cases where both Master and Employer having exercised the maximum amount of care remain responsible for the negligent performance of their subordinates. To this effect De Cupis points out: 'è inutile, per il committente, provare che egli ha scelto bene e che quindi non può parlarsi di Culpa in Eligendo, precisamente perchè la sua responsibilità e independentemente dalla colpa'.

Some writers have dwelt on the doctrine of Representation of fault. But it is difficult to accept this doctrine, as it is based on the fictitious transfer of liability from the servant to the Master 'Ma a quest'altra teoria è stato obiettato che, se davvero avvenisse una proiezzione del fatto del domestico o commesso sulla persona del padrone o committente, non spiegherebbe il sussistere della responsabilità del domestico o commesso accanto a quella del padrone o committente'. On the other hand since this is a question of responsibility without fault the ratio legis must be sought elsewhere.

Various writers including Barassi, Pacchioni and Trimarchi adopt the theory of Rischio Profitto, in which 'secondo l'opinione più evoluta si identifichi la responsabilità del preponente con quella dell'impresa; cosí da tradurne il peso in un demento di costi che l'imprenditore deve tener presente e può riversare attraverso il mecchanismo dei prezzi sulla massa dei consumatori (e del resto può cautetarzi contro il rischio con il ricorso all'assicurazione (Nov. Digesto). Since the Master has made use of the services of his servant for his own benefit, he has to accept as well the consequences arising from such an activity. Considering that the law in no way, refers to the social and economical implications which the authors of this theory have indicated Professor Renato Scognamiglio is prone to discard the theory as incorrect. The theory of risk and profit would not exhaust all the possible relations between the master and the servant, the employer and the employee. Indeed, one is left to wonder what would be the type of responsibility if the Master entrusts his servant with a personal undertaking, quite independent of any economic considerations.

Perhaps the responsibility of the Principal for damages incurred by his subordinate is best explained by De Cupis in 'La critica della critica' basing himself on the well-known saying: Cuius commoda eius incommoda. The Responsibility arising from the provisions of section 2049 presuppose a casual relationship between the entrusting of the duties and the damage produced by the exercise of those duties. 'Orbene, a questo rapporto, cosí strutturato, corrisponde un particolare interesse del datore di lavoro, che consegna l'utilità inerente all'attività del lavoratore, tal quale questa attività è da lui, per i propri fini, diretta e regolata. E poichè la medesima attività, intensamente vincolata a favore del datore di lavoro, può produrre danni a terzi giustizia vuole che il datore di lavoro sia responsabile di tali danni, in conformità dell'antico principio secondo cui particolari effetti pregiudiziendi non possono scindersi da particolari effetti utili, le posizioni di più intenso vantaggio hanno da essere bilanciate dal peso di una particolare responsabilità ("cuius commoda cius et incommoda") (163)' (De Cupis 'Il Danno' p. 152).

The liability which the Master or Employer is to assume is part of the risk accompanying the services entrusted to the servant or employee. It is because the immediate cause of the damage is linked up with an activity directed towards the be-

nefit of the Master or Employer that the latter is liable vis-a-vis the third party independently of any fault on his part. Insofar as he has initiated a kind of relationship which ultimately results in damage he is to be considered the Mediate cause. De Cupis accepts the theory of 'Rischio d'Impresa' as the logical explanation of this type of responsibility. He goes so far as to say that: 'se la responsabilità dei padroni e dei committenti costituisce la contropartita di una situazione di vantaggio, essa è destinata a venir meno ove manchi quest'ultima: in altre parole, se nessun utile personale si recava dall'opera altrui affidata, cessa la "ratio" che ispira la legge, e questa non va applicata (cessante ratione Legis, cessat et ipsa Lex). I soggetti che si propongono un fine filantropico anzichè speculativo, non sono responsabili ex articolo in esame del danno arrecato dai propri dipendenti'. Incidentally this view is held by Mosca (vide 'Nuovi studi e nuove dottrine sulla colpa') and Gabba ('Quistioni di diritto Civile' 11 page 271). As pointed out already, this theory of Rischio-Profitto has been criticized by Scognamiglio according to whose opinion, responsibility under articolo 2049, can be attributed to any relationship between 'un padrone e un domestico' and 'un committente ed un commesso'. That is exactly why he rejects the theory of Rischio Profitto and refuses to limit such a responsibility to that sphere of liability.

The hardened position taken by De Cupis in 1958 when he was writing 'DEI FATTI ILLECITI' (Vide Commentario del Codice Civile Libro Quarto – Delle Obbligazioni) has been reviewed in his recent work 'Il Danno' (1970), which explores the intellectual hinterland in the theory of responsibility, probably as a result of the criticism levelled at his theory. His answer has been quite convincing. The starting point remains, that the burden of risk is justified by the utility accruing from the relationship and within the sphere of activity which he directs. 'Quale che sia questa destinazione' he says 'anche se essa abbia carattere liberale e meramente filantropico, ciò non altera la realizzazzione dell'interesse del datore di lavoro all'interno del rapporto di lavoro, e non può quindi rivolgere a fini liberali e filantropici risultati del lavoro che intendano rivolgere ai fini liberali e filantropici i risultati del lavoro per essi svolto rispondono ex art. 2049 dei danni arrecati ai terzi dai lavoratori nell'esercizio delle affidate incombenze'.

It seems possible to deduce from what has been considered, that generally, any type of relationship between a principal and his subordinate is contemplated by this article. The extent to which it finds application, depends upon the particular instances to which it is applied and no 'a priori' definition could be laid down. Various commentators have upheld the idea that liability would arise even if the office under which the employee is acting is one of appointment or is imposed. The important element here is the relationship between the Principal who has ordered and the subordinate who is entrusted with the undertaking. So long as the Master or Employer have 'una normale e giuridica possibilità di controllo e di sorveglianza, sul lavoratore, in virtù del potere direttivo spettante al datore di lavoro', a relationship exists which is sanctioned by article 2049. It is immaterial whether that power conforms or otherwise with strict supervision so long as control and supervision are possible from the nature of the relationship. In practice such degree of control may not exist, but that is no excuse to exclude responsibility. It is only were the the possibility of control is incompatible with the juridical nature of the relationship, that responsibility is excluded. This even, where the principal has ordered specific works to be carried out. Because there is no risk where the control of the action for which one is responsible is impossible from the very nature of the relationship. How can I be held liable for damages which the plasterer whom I employ incurs when his activity is totally out of my control? 'Il rischio d'impresa non può estendersi a danni verificatasi nello svol-

gimento di un lavoro che, seppure eseguito per l'interesse dell'imprenditore, è estraneo alla sfera del suo potere direttivo... Il rischio, invero non può incombere su chi non ha il potere di ridurre il pericolo incrisce' (De Cupis 'Del Danno' p. 157 Vol. 111). However where the principal is not the 'de iure' incumbent of the responsibilities, as when a temporary person is entrusted with supervision of work ordered by the principal responsible under art. 2049 subsists, nevertheless. In fact the responsibility envisaged in this article arises from the 'lavori subordinati' which are contemplated. Any deviation from this rule would negative any responsibility on the part of the principal, and this is the case where the nature of work undertaken does not allow for direction and supervision of the Employer or Principal. Where however the principal, maliciously orders such work to be executed with the full knowledge that damages may ensue then he would be the mediate cause of damage and as such, therefore, accountable. Where the relationship between the principal and the subordinate does not partake in the nature of 'subordinazione gerarchica' contemplated in section 2049, then responsibility of the principal does not arise. For instance, a mandator cannot be held responsible for damages incurred by a Mandatory.

Up to a certain extent, this kind of responsibility is objective, insofar as it exists independently of any fault of the person responsible. Where the principal is not responsible for damages sustained by his subordinate, then ordinarily responsibility falls upon the subordinate who is the author of the delictual action. However, art. 2049 is not all that could be said of any responsibility arising from the relationship of Master – Servant, Employer – Employee. Otherwise the principal may be held responsible under art. 2043 for having been the mediate cause of damages. But in this case the burden of proof lies with the person who has suffered the damage.

The Italian Legal System has gone so far as to apply the principle of indirect responsibility, also in relation to the state. The state is held liable for acts done by its employees in the course of their duties. Thus, says Cammeo (Corso di Diritto Amministrativo p. 619) 'un'altra dottrina.... Ammette la responsabilità per questi desumendola dai principi di diritto privato desumendola dai principi di diritto privato a tali atti applicabili, e precisamente dalla norma del diritto civile contenuta nell'art. 1153 (2048, 2049) Cod. Civ; per cui i committenti sono responsabili degli atti dei loro commessi,....'. Le Persone giuridiche, e l'amministrazione in particolare come si avvantaggiano dall'attività lecita delle persone fisiche che formano i loro organi, cosí debbono sopportare le conseguenze della loro attività illecita'. This is nothing but the doctrine of 'cius commoda cius incommoda' in its pure application.

Maltese Law on the subject has not been so clear and so assertive. Positive legislation does not contain anything to this effect, and any application by the courts has followed the lines of doctrinal interpretation. But that has not been very consistent either, and any positive statement on the position cannot allow for dogmatic predicaments. The difficulties which have to be superseded partially arise from the unsolved problem of whether to attribute to the Government any liability in choosing its servants. Italian writers have argued, that this type of liability cannot be applied to the Government, since Government appoints its servants on the basis of examination and relevant qualifications. This would make the application of section 1080 (Culpa in Eligendo) impossible where the Government is concerned. Modern writers on the subject tend to regard the application of Culpa in Eligendo in Government Liability with disfavour. The reason is simple: one cannot appreciate a reconciliation of sec. 1080 with the liability of the Government while on the other hand the theory of Rischio d'Impresa which forms the basis of art. 2049 of the Italian Code can be extended even as far as the Administration is concerned.

ON THE STATUS OF THE HOLY SEE IN INTERNATIONAL LAW

VINCENT A. DE GAETANO

ON September 20, 1870, troops of the King of Italy, acting in defiance of an agreement with France whereby Italy pledged to France not to attack what was left of the Pope's territory – the Patrimony of St. Peter – marched on Rome, and the city's walls and gates were battered by cannon. Pius IX gave the order to capitulate and Italy was at last united. But the refusal of the Pope to admit the legitimacy of the *fait accompli*, together with the conflicting opinions of a multitude of writers on International Law and the Roman Question, and the unique position of the Supreme Pontiff, have given rise – in academic circles, if not in practice, – to considerable confusion as to the status of the Holy See in International Law.

First of all, what do we mean by the 'Holy See'? The expression 'Holy See' has two different meanings: in its narrower sense the Holy See means the office of Supreme Pontiff; in his wider sense, however, it means the whole complex of Congregations, Tribunals, Offices, Commissions, etc., through which the Supreme Pontiff provides for the Government of the Catholic Church (cf. canon 7 of the Code of Canon Law). As regards the first of the two meanings – and, strictly speaking, we are only concerned with this first meaning – we may say that if the Catholic Church is a *societas perfecta*, the Holy See may be considered a sovereign institution, being the supreme organ of the Church. In the legal system of the Church the Holy See, understood in this narrower sense, is considered a legal body by divine right (cf. canon 100 para. 1 of the Code of Canon Law).

This interpretation is valid for canon law, and has been taught for centuries by the majority of theologians and Catholic canonists. The problem which we wish to examine here, however, is the position of the Holy See in the international legal system, especially with regard to doctrine and practice.

Prior to 1870 the situation in International Law seemed quite clear. The Pope was the temporal ruler of the Papal States; in this respect he was an ordinary Prince or King. But the Pope was also the spiritual leader of all Catholics. He therefore constituted in his person a personal union of two different organs, the highest organs of two different subjects of International Law: the Papal States and the Holy See. Even prior to 1870 the more important of the two was the Holy See. It is clear that Catholic States granted the privilege of Deanship to the Papal Nuncios not because of the political importance of the Papal States, but because of the supreme spiritual sovereignty of the Holy See.

Of these two persons in International Law, the one, the Papal States, undoubtedly came to an end under the rules of general international law by Italian conquest and subjugation in 1870. The Holy See was thus deprived of territorial sovereignty, although there is no lack of writers who maintained that the Holy See's territorial sovereignty continued either *de jure* or *de facto* over the Vatican buildings. At this point what the Italian legislators and politicians did was to distinguish sharply between the Pope's prerogatives, which they classified into two categories. In the first they placed those rights which he exercised as the civil ruler of the Papal States. These rights, in united Italy, went over to the House of Savoy. In the second category they placed those rights which accrued to the Sovereign Pontiff as the supreme head of the Catholic Church. These rights the Italians were fully prepared to recognise and preserve, guaranteeing them, if necessary, by treaty with other States. The Law (or Act) of Guaran-

tee tells us what these spiritual rights were conceived to be: they included the right of immunity, of inviolability, and of extra-territoriality, the right to have violations of these rights punished and the right to exchange diplomatic representatives. This Law of Guarantee did not, however, and nor was it intended to, confer any international rights upon the Holy See. What the lawmaker did in 1871 was to enact legislation which constituted formal and unequivocal recognition of preexisting rights. The Law merely conformed domestic legislation to a juridical situation that Italian law could neither create nor abolish. Hence the following comment of the then Foreign Minister Emilio Visconti-Venosta on Article 11, which deals with the envoys accredited to the Holy See and those sent by the Pope: 'The law of May 13, in recognising the existence of a diplomatic corps accredited to the Holy Father as well as the right to continue to dispatch nuncios to the heads of other governments, leaves untouched the eminent position which the public law of Europe has recognised in the Pope, as far as the exercise of his lofty spiritual mission is concerned ... Our duty therefore is to make it known to Europe that nothing has changed in the position of the papacy, from the viewpoint of public law, as far as his spiritual authority is concerned ... The law is nothing else ... than a formal and explicit recognition of the prerogatives and honours that international law accords to the papacy.'

Besides this recognition by Italy of the international status of the Holy See, two other factors militate against those who maintain that the Holy See is not an international person. The first of these factors is Canon Law itself. Canon 218 states: *Romanus Pontifex ... habet supremam et plenam potestatem jurisdictionis in universam Ecclesiam ... Haec potestas est ... a quavis humana auctoritate independens.* The second factor is general customary international law, or the practice of States. For even after 1870 the Holy See continued to conclude concordats and continued, with the consent of a majority of States, to exercise the active and passive rights of legation. The legal position of its diplomatic agents remained based on general international law (not on the Italian Law of Guarantee, a municipal law enacted under an international duty incumbent upon Italy). Moreover, concordats were, as they still are, negotiated and signed like any international treaty; they are concluded on the basis of full equality (although some writers deny this); they need ratification; they can be modified only by common consent; their norms become binding on individuals only by their transformation into municipal law. A number of these concordats have been registered and published by the Secretariat of the League of Nations. As the Holy See is a person in *general* international law, its capacity to conclude concordats is by no means limited to Catholic States. One may conclude by adding, in confirmation of the above, the visits which heads of States, even non-Catholic ones, paid to the Supreme Pontiff as to a sovereign in the period between 1870 and 1929.

Pietro Esperon, one of the propounders of the theory that the Holy See is not a person in International Law, made the fundamental mistake of starting his thesis from a theoretical hypothesis, such as the one that only States can be subjects of International Law, or from a gratuitous supposition that religious affairs could not possibly be concluded through the instruments of the law of nations. This doctrinaire construction is wholly rejected to-day.

The Lateran Treaty of 1929 in no way changed the international position of the Holy See. In fact, this treaty, which is undoubtedly (and is considered almost unanimously as such) an international treaty, was negotiated by the Holy See in its quality of supreme organ of the Catholic Church, and not of supreme organ of the State of the Vatican City (which until then did not exist). Besides in this treaty it is stated that (Art. 2): 'Italy recognises the sovereignty of the Holy See in international affairs as an attribute inherent in its nature, in conformity with its tradition and

with the needs of its mission in the world.' This provision, by which the sovereignty of the Holy See in international affairs, independently of its possession of territory, is implicitly affirmed by the Holy See and explicitly recognised by the Italian State, is in clear contrast to the two articles immediately following, which recognise the territorial sovereignty of the Holy See. For the Lateran Treaty furthermore created the State of the Vatican City, for which Italy made a cession of territory. This State of the Vatican City is a subject of International Law different from the Holy See. It has become a member of the Universal Postal Union. But whereas the Vatican City has the legal position proper to any State, it has also several particular characteristics worth noting, some of which influence to a greater or lesser extent its legal status.

In the first place, the State of the Vatican City has, in fact been, constituted not to permit an orderly society of men in a given territory, but to assure the liberty and independence of the Holy See in the spiritual government of the diocese of Rome and of the Catholic Church in every part of the world, and to constitute a visible sign of such liberty and independence. Because the State is constituted as a means and not as an end, and therefore requires a special connection with the Holy See, the Sovereign of the State is of necessity the same person as the visible head of the Catholic Church and the personification of the Holy See, that is to say, the Supreme Pontiff, This particular type of connection has been compared by some scholars to a real union between two States, while others compare it to a personal union, as some authors had maintained also with regard to the relationship between the Catholic Church and the Papal States. The truth of the matter is, however, that although we are dealing with an organic union, it is different from the various types of organic unions between States as known in International Law, for the Holy See is not a State; and therefore what we can state with some conviction is merely that the constitution of the Vatican City is not autonomous, but derived from the Holy See, and that therefore **the Vatican City is a vassal State of the Holy See.**

In accordance with the special nature of such a State, the Vatican City has assumed the position of a neutral State in virtue of Article 24 of the Lateran Treaty. Although such a position was, in the above-mentioned article, recognised only by Italy, this position has been recognised, at least implicitly, by most other States.

All territory of the State of the Vatican City is recorded among the historical sites in the register kept by UNESCO of cultural property accorded special protection by Article 9 of the treaty for the protection of cultural property in the case of armed conflict, signed in the Hague on 14 May, 1954.

Finally there are writers who believe they have found a resemblance which is more or less complete between the State of the Vatican City (which, if it were so, would not be a true State) and the seats of international organisations: that is, the State would have the same function in relation to the Holy See as the respective seat would have for each organisation. It has been argued that a parallel exists between the position of the State of the Vatican City with respect to Italy and the position of the seat of the United Nations with respect to the United States of America. However, aside from other considerations, there is undeniably a substantial difference, at least with regard to the fact that Italy does not have territorial sovereignty in the State of the Vatican City.

The Holy See certainly is not eligible as a member of the United Nations, because under Article 4 of the Charter admission is only open to States, which the Holy See is not. The Vatican City would not be admitted because it is not a sovereign State, but a vassal State of the Holy See. But the Holy See may participate in some activities of the United Nations and may also be chosen as a mediator or arbiter, and can be invited to international conferences.

To sum up we may state that at the present time prevailing opinion recognises

the Holy See's sovereignty in international affairs, and also considers as personified in the Holy See the international subjectivity of the Catholic Church, independently from the territorial sovereignty which the Holy See has over the territory of the Vatican City.

Sources and further reading:

Graham S.J., Vatican Diplomacy, ed. 1959, Princetown University Press.

Graham S.J., Rise of the Double Diplomatic Corps in Rome, ed. 1952, The Hague.

Annuario Pontificio. Roma, 1860-1870.

The Tablet, Sept. 18, 1943, Germans and the Vatican City State.

Ottaviani, Istitutiones Iuris Pubblici Ecclesiastici, 1958, Vatican City.

Concilium, October 1970 – Pio Ciprotti.

Puente Egido: Personalidad internacional de la Ciudad del Vaticano, 1965, Madrid.

Le Fur: Precis de droit international public, 1937, Paris, p. 139.

Rivista di Diritto Internazionale, XXI (1929) pp. 165-176.

American Journal of International Law, XXVII, i, (1933), pp. 271-289.

American Journal of International Law, XLVI (1952), pp. 308-314.

American Journal of International Law, Vol. 38, (1944), pp. 452-457.

Noel Blakiston: The Roman Question, ed. 1962, Chapman and Hall, London.

Amos J. Peaslee: Constitutions of Nations, Vol. 3, pp. 666-699, The Hague.

ACTIO DE IN REM VERSO IN ENGLISH LAW

JOHN LAFERLA

LORD Wright while describing Quasi-Contract said: 'Law is bound to provide remedies for unjust enrichment or unjust benefit, that is, to prevent one from retaining the money of, or some benefit, derived from, another which is against conscience that he should keep. Such remedies in English Law are generally different from those in contract or tort, and now fall in a third category of Common Law called Quasi-Contract or Restitution'.

Chitty on Contracts says that: Precedents deal with diverse situations, but they involve a special relationship between two persons where the law imposes a duty on one to pay a sum of money or (exceptionally) to deliver specific property to another. The underlying aim of the precedents seems to be compulsion of the defendant to make restitution of a benefit which he ought not in justice to retain at the expense of the plaintiff. A quasi-contractual situation resembles a contractual one in that liability is imposed upon a particular person to pay money to another, yet it differs in that quasi-contractual liability is imposed by law irrespective of the agreement of the parties. Liability in quasi-contracts is not necessarily based on any 'wrong' (tort) committed by the defendant.

'Indebitatus assumpsit' which was the remedy for breaches of contract in order to enforce consensual obligations, became a complete alternative to the old writ of debt, and inherited the wide scope of debt over not only consensual obligation but also some obligations classified in modern law as quasi-contractual.

'Account' came to be used to recover money paid under a mistake or money paid for a consideration which had wholly failed. This is like our 'Indebiti Solutio'.

However, in England, the Common Law was not alone in providing a remedy for unjustified enrichment. Equity independently developed some principles which are aimed at the same result, viz., to force one disgorge property in his possession which rightly 'belong' to the plaintiff. Equity employed two methods:

1. 'constructive' trust, by which one was deemed to be a trustee of the property for the plaintiff, so that all the remedies of the law of trusts were available to enable the plaintiff as beneficiary to recover what was due to him.

2. By the mechanism of a tracing order, property in the wrong hands could be 'followed' or 'traced' by the true owner despite changes or admixture of the property. In U.S.A. these two principles of Common Law and equity were amalgamated into the topic called 'Restitution'. English lawyers are now aware of the interrelation of law and equity in quasi-contract and restitution.

The theoretical basis of quasi-contractual liability was for many years controversial. Two main theories are considered:

1. Unjustified Enrichment; and
2. Implied Contract Theory.

1. In 1760 Lord Mansfield called the principle of Unjustified Enrichment 'an equitable action to cover back money which ought not in justice to be kept'. It lies for money which, 'ex aequo et bono', the defendant ought to refund; this lies for money paid by mistake, or upon a consideration which happens to fail or for money got through imposition or extortion, or oppression; or an undue advantage taken of the plaintiff's situation. 'The defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money'. The equity here referred to is the 'ius naturale' of the Roman Law, that is, Natural Justice.

The 'unjust benefit' theory has been criticised on the ground that the test of natural justice is too vague. But there is

ılready a considerable body of case law ealing with categories of quasi-contract, nd judges follow the existing precedents, /hich cover most of the likely problems of lestitution.

Goff & Jones, authors of 'Restitution in :nglish Law', accept the principle of unust enrichment. They say that the law olds that: it is unjust to allow the defenlant to retain a benefit received at the laintiff's expense e.g. 'the benefit must ot have been conferred officiously or conerred in submission to an honest claim, or "as an out-and out gift"'. Restitution 'ill not be awarded if such an award would ead to the indirect enforcement of a tranaction which the law refuses to enforce; estitution will not be awarded to enable ne to make a profit out of his own wrong. he claimant must put the other party back ito his original position. It is submitted, owever, that the 'unjust benefit' theory hould be regarded as the correct theoretial principle of Restitution and of quasiontractual liability, since the alternative ow to be considered, is obviously inadeıate.

2. The Implied Contract Theory derives om the fact that previously a contractual :medy had been used to obtain restitution f money had and received, but in that acon (indebitatus assumpsit) there was the otion of a promise to pay. This section as abrogated in 1852 Common Law Proedure Act.

This theory, however, is greatly critised because it fails to show in what cirumstances the law imposes Quasi-conactual Liability.

In English Case Law there seems to be *classification of actions* between:

1. 'RESTITUTION', where the defendant is bliged to restore or pay for a benefit reeived from the plaintiff, and 'Liability to ccount to Plaintiff' for money received om a third party. As will be seen in the ext paragraph 'Restitution' and our 'Neotiorum Gestio' are similar.

2. 'REIMBURSEMENT' where the defendant is obliged to repay the plaintiff the money paid by the plaintiff to third persons.

3. 'RECOMPENSE' such as 'Quantum Meruit' for services rendered.

4. 'ACCOUNTS STATED'.

These four *actions* will now be dealt with in detail. The FIRST is the ACTION FOR MONEY HAD AND RECEIVED BY THE DEFENDANT TO THE PLAINTIFF'S USE, i.e. RESTITUTION:

This is an action for money had and received by the defendant to the use of the plaintiff when the plaintiff has paid money to the defendant under certain specified circumstances. The cases for Restitution include:

(a) An action for recovery of money paid under a MISTAKE OF FACT which must be basic. This must include sheer ignorance of something relevant to the transaction. A case decided so, is: NORWICH UNION FIRE INSURANCE SOCIETY LTD. v. WILLIAM H. PRICE LTD. But, money paid in discharge of a legal obligation is not recoverable even if paid by mistake.

(b) Payment under a MISTAKE OF LAW is usually not recoverable. But if there is something more than a mistake of law, (and there usually is), it is recoverable. In 'HOLT V. MARKHAM' payment was refused. Mistake of Common Law and Equity also falls here.

(c) A MISTAKE OF GENERAL LAW in construction of a written document is considered a mistake of law.

There is an exception to the rule that a mistake of law prevents recovery and this is where a part of an estate has been distributed according to a void testamentary disposition. Again, recovery is missable where payment is made under contract but under a mistake of law, and neither party knew that the payment was illegal. But any fraud, oppression or undue influence gives rise to restitution even if made under a mistake of law.

In 'AIKEN V. SHORT' it was held that for restitution the mistake of fact must be one, which if true, would have made the person liable to pay the money and not merely one

which would make it desirable that he should pay. But in 'KERRISON v. GLYN MILLS, CURRIE & CO.' recovery was allowed although the mistake, had it been true, would not give rise to an obligation to pay.

'LARNER v. L.C.C.' indicates that recovery is permitted where the mistake of fact is fundamental or essential, and that a mistake may be such, even if the supposed fact were true, there would be no legal obligation to make payment.

(d) NEGLIGENCE to see if payment is actually due does not prevent recovery. But recovery is not admissable if the payee by his words and intention induced the payer to act on the belief of the facts represented to him. An ESTOPPEL will cause the action for recovery to cease, and this is a clear case when recovery is not permitted.

Besides these, some writers also include as circumstances which qualify under the heading of Restitution: *a consideration which has wholly failed, and Extortion.*

In the former, absence of consideration is not enough – so, money paid by way of gift, cannot be recovered. But money paid in consideration of the sale and delivery of goods can be recovered if by reason of non-delivery of the goods there is a total failure of the consideration for which the money was paid.

In case of Duress, which may be both physical or moral, and Extortion, the money which is paid, is paid under pressure and is not paid voluntarily. Similarly, that paid in discharge of an illegal demand made 'colore officii', or under pressure or coercion, can be recovered back as not paid volontarily. A mere threat to do what the person threatening is free in law to do cannot amount to sufficient coercion. But some Commonwealth Court decisions hold that a threatened breach of contract is 'practical compulsion', and the victim is allowed to recover.

Also included under this action for Restitution is 'Liability to Account to Plaintiffs for Money Received from a Third Party'.

The SECOND is: ACTIONS FOR MONEY PAID BY THE PLAINTIFF TO THE DEFENDANT'S USE, *i.e.* REIMBURSEMENT:

This is an action for money paid where the plaintiff has under compulsion of law paid money which the defendant was ultimately liable to pay so that the latter obtains the benefit of the payment by the discharge of liability.

In certain situations two persons may be subject to a common legal liability to a third person, but as between themselves one is primarily and the other only secondarily liable to discharge it. If the person secondarily liable pays off the third person, and thereby discharges the common liability, he may recover the amount paid from the person who is ultimately liable.

Sutton & Shannon give this example: If A leaves his goods on the premises of a lessee, with the latter's authority, and they are then distrained by the landlord for non-payment by the lessee of his rent, so that A is legally compelled to pay the rent in order to recover his goods, he can afterwards sue the lessee for the amount paid. Again, where a local authority has a right to demand that a liability be met by either two persons, for instance, to require either a landlord or a tenant to repair drains, then, if the person who is compelled to pay is not responsible as between the two of them, he can recover from the other. Here, one has to show that the defendant was subject to a demand in respect of the same liability as the plaintiff.

The THIRD action: is that on a QUANTUM MERUIT CLAIM, i.e. RECOMPENSE.

Where the defendant is obliged to pay the plaintiff, e.g. for work done, but no specific sum is owing, the plaintiff can recover a reasonable sum. Treitel in his 'Law of Contract' says: 'A party can claim Quantum Meruit for work or goods under a contract which does not provide a specific price, and where the agreement is implied'. Later, he generalises in the words: 'If the plaintiff has a legal right to be paid the Court will award a sum'. Most writers quote the following illustration: where a purchas-

er has bought goods by weight and, owing to a mistake in weighing, has paid for a larger quantity than he has received, he can recover the over-payment in quasi-contract. One who has done work under a contract which is void may be able to obtain payment by way of quasi-contract, through a quantum meruit claim which literally means 'so much as the thing is worth'. This is the right to a *reasonable* remuneration for work done or to a reasonable price for goods delivered. It is a quasi-contractual right arising by virtue of the fact that something has been done by one party on behalf of the other.

It is remarked by Sutton & Shannon that claims on quantum meruit may be either quasi-contractual or contractual, and it is at times not clear to which category a particular claim should be assigned.

The FOURTH action is that: UPON ACCOUNTS STATED:

An account stated is the admission of a sum of money being due from the defendant to the plaintiff. It must be sued upon as a distinct cause of action.

The simplest illustration of an account stated is an ordinary I.O.U. The admission implies a promise to pay and the existing debt furnishes the consideration. The account stated is not conclusive between the parties, and it is always open to the defendant to prove that the account was stated (i.e. that he made the admission), by mistake, or that it was respecting debts void for want of consideration or for illegality. The onus of proof is on the defendant; the plaintiff need only produce his I.O.U. or other admission and is entitled to succeed unless the defendant brings foward evidence in support of his plea.

A rather different type of 'account stated' occurs when parties state items on both sides of the accounts and strike a balance. This is a contractual settlement of their mutual claims; here there is a promise to pay the balance given for consideration on the other side and, therefore, action may be brought on the account stated even if some of the debts were unenforceable or statute barred.

From this one clearly sees that the English Courts have tried to solve this problem as it arose and have evolved a type of classification of actions whereby the person who is prejudiced by another's unjustified enrichment can get some remedy.

THE LEGAL RELATIONSHIP IN EMPLOYMENT

PAUL PULLICINO

(Taken from the June 1973 edition of the COBWEB, *by courtesy of the Editor)*

PROTECTION of workers' wages and the security of their employment are two main aspects of the legal relationship between employer and employee regulated by the Conditions of Employment (Regulations) Act 1952. Prior to this date, there was no specific legal recognition of wage protection and the few provisions relating to the termination of employment found in the Civil Code had long proved insufficient in the light of the development of universal industrial law.

Social legislation coupled with the trade union movement has had a short history in Malta. Trade Unions, which had been legalised in the United Kingdom in 1871, were not given a statutory object in Malta until the 1937 Trade Unions Ordinance.[1] Section 2 of the Ordinance states that the statutory object of a trade union is:

'the adjustment of wages and the regulation of the relations between workmen and workmen or between workmen and employer and the conditions of employment generally...'

Trade Unions first sprang up among the employees of the British Admiralty at the Drydocks and it was not until the growth of local private industry that pressure was brought to bear on the legislature to supplement the political remedies afforded by unionism with legal regulation independent of the continuous battle of bargaining power between capital and labour.

PROTECTION OF WAGES

The 1952 Act and consequent amendments recognised the special right of the worker to the fruits of his labour. By law his wages are due to be paid to him at regulated periods, on a working day, and in the form of cash unless it is customary to be paid by cheque. The integrity of his earnings is maintained in so far as up to the amount of £M50 an employee has a privileged claim in respect of wages due against his employer above all the latter's creditors. This protection is extended in regard to the worker's own creditors in the sense that they cannot issue a garnishee order on the first £M100 of monthly wages.

Although an employer cannot withhold a worker's wages by claiming a set-off for the debts that the latter may owe him, there are two wage deductions allowed by law. Fines levied by the employer on his employees are permitted only with the concurrence of three conditions:

'(a) the terms of any written contract of service signed by the *employees* specify in detail the fine or fines to which the employee may become liable...

(b) the terms of any such contract are set out in a notice kept constantly affixed conspicuously in a place or places open to the employees...

(c) the terms of any such contract have been previously approved by the Director.'[2]

The legal phraseology, namely the plural use of 'employees' in (a) above seems to indicate the necessity of a collective agreement between workers and employer before fines can be levied, simultaneously ruling out the possibility of fines in an individual contract of employment, which interpretation is more in workers' interests.

The second case contemplates a worker who without just cause has failed to give his employer the total number of hours of work. The employer may not inflict a fine, but deduct from wages the proportion of the work lost.

[1] Chapter 146 (Laws of Malta 1942)

[2] Director of Labour and Emigration

Probationary Employment

The main legal difficulty which is confronted in the 1952 Act is the provisions relating to the termination of employment, the reason being, primarily the vagueness of the law and secondly judicial interpretation of the law. In the two decisions of our Courts referred to below there has been a rift between the spirit of the Act as a piece of industrial legislation and that of juridical application. It would be wrong to say that the sole purpose of the Act was the interest of the employee, but it was the main aim to better his conditions of employment.

For example, the law in s. 25(1) contemplates a probationary employment for contracts of service for a definite and an indefinite period;

'The first one month of any employment under a contract of service *shall be deemed* to be probationary employment and may be terminated at will by either party without notice;

Provided that where the employment is governed by an industrial agreement, such agreement *may* provide for a probationary employment up to a period of six months.'

On reading this provision, it is quite clear that the law, in the interests of the employee, has limited the time in which his employer may dismiss him at will and without notice to the maximum of one month, saving the case of an 'industrial agreement' of which the meaning is not clear.[3] This is the line of argument taken up by the prosecution in Police v. Gatt (decided 5.11.72).

The editor of a daily newspaper was bound by a written contract which his employer claimed included a probationary period of 12 months, while the prosecution claimed that the editor had been fired after the initial month without notice or just cause since the long probationary clause was illegal. However the Court of Appeal held that worker and employer may make a valid clause shortening or lenghtening the legal probationary employment of one month, on the basis that s. 25(1) is a presumption 'jure tantum' in the absence of agreement to the contrary.

Therefore, an employer in times of surplus unemployment may exploit the situation and force new employees into a written contract in which for a long period of years they are subject to dismissal without notice.

Good Cause for Termination

Existing law in the Act on the question of good or just cause for dismissal by employer or abandonment by employee reads as follows:

'A contract of service for an indefinite time may be terminated by *giving notice*... by the employee without assigning any reason, and by the employer, saving the provision of subsection (10) of this section, only on grounds of redundancy:'

(s. 25(2))

'Notwithstanding the foregoing provisions of this section an employer may dismiss the employee, and the employee may abandon the service of the employer, *without giving notice* and without any liability to make payment as there is good and sufficient cause for such dismissal or abandonment.'

(s. 25(10))

In simple language, a worker bound by a contract of an *indefinite* time may leave either by giving notice or assigning to his employer a good and sufficient reason. A worker bound by a contract for a *definite* time, on the other hand, must either pay to his employer half the amount of the full wages which would be due to him up to the expiry date of the contract, or provide

[3] According to s. 2 of the Conditions of Employment (Regulations) Act 'industrial agreement' means –

'an agreement entered into between an employer or organisations of employers and employees or organisations of employees regarding conditions of employment in accordance with provisions of any law in force in Malta.'

a good and sufficient reason for abandoning the contract.

As regards an employer, he may dismiss workers bound by an *indefinite* time of employment on good and sufficient cause, OR *by giving notice and only on the ground of redundancy*. Under the Act before 1969, an employer was free to terminate such contracts by merely giving notice and was not obliged to prove any redundancy. In contracts of a *definite* period an employer can dismiss a worker either by paying to him half the amount of the full wages which would be due up to the expiry date of the contract OR by showing good and sufficient cause for the dismissal.

However, the law declined to state whether redundancy would be justifiable grounds for the termination of a contract for a definite time, and it left us with the question that arose in 1972 in the case Police v. Degiorgio. A firm of architects laid off workers who had been employed under a contract for a definite time before their contract had expired on the grounds of redundancy. The Magistrates Court held that redundancy in itself constitutes a 'good and sufficient cause' mentioned in s. 25(10), quoted above, and that the firm was not bound to pay the workers half wages for the remaining portion of the aborted contract.

Legally, the interpretation was correct but as a result it left an unenviable discord between the worker who binds himself to an employer for a definite number of years in a sense of security and the worker who is indefinitely employed. Oddly enough, in times of company redundancy it is the latter who gets notice pay while the former is dismissed without any form of indemnity. The situation is calling out for more logical terminology in the law.

RIGHT OF RE-INSTATEMENT

The main concern in legal circles in regard to the Condition of Employment Act is the absence of provisions dealing with the legal remedies offered to a party who has suffered an unjust termination of employment. As to the compensatory form of damages the law clearly establishes the quantum, but as we have seen it is not clear as to when and in what circumstances it is due. The other remedy, that of re-instatement (restituo in integrum), is an action not normally given in contracts of a personal nature under which we include the contract of service. However, in Act XXI of 1969 amending the 1952 Act, the right of re-instatement was made available by virtue of s. 25(2);

'any employee whose employment is terminated on the grounds of redundancy shall be entitled to re-employment if the post formerly occupied by him is again available within a period of one year from the date of termination of employment.'

This right of re-instatement pertains only to a worker who has been dismissed on grounds of redundancy and is limited by a duration of one year. A further point is that according to the wording of the law this remedy would be available only to cases where the redundant worker was bound by an indefinite time contract. It seems that once again the distinction between definite and indefinite time contracts has been made to the prejudice of what one would call the more secure employment.

In this brief inroad into the application of local industrial legislation it is hoped that the inadequacies of the present laws have been brought to light. Any government which seeks an advanced level of industrialisation with the attainment of economic independence concurrently with social justice in mind must first provide for proper and comprehensive regulation of the conditions of employment.

TAQSIR TAS-SENTENZI TAL-BORD TAT-TAXXA TA' L-INCOME (1955)

Kawża Nru. 1/1955 deċiża fil-11 ta' Marzu, 1955

It-taxpayer kien impjegat mal-War Department u kien jagħmel ukoll xogħol ta' Commission Agent, u jimporta xi ħaġa akkont tiegħu. Għal sena bażi 1951 huwa ddijara profitti netti ta' £22, u l-Kummissarju fissa profitti ta' £110.

Il-Bord laqa' l-appell, u rritiena li l-appellant ipprova li ma qalax iktar milli ddijara, billi rritiena li ċ-ċirkostanzi konferiati bil-ġurament ta' l-appellant kienu lawsibli u ma setgħux bla raġuni jiġu kartati.

Ex-officio assessment –

Kawża Nru. 2/1955 deċiża fid-19 ta' Ottubru, 1955

It-taxpayer kellu ħanut tal-laħam, u osta tal-ħut, u kien jimporta ħut frisk, iċċa bi sħab u biċċa akkont tiegħu.

Mill-bejgħ tal-laħam, l-appellant kien idikjara profitt ta' 7% fuq is-sales. Il-Bord ffissa l-gross profit bir-rata ta' 10% fuq l-cost price, u osserva li kien hemm ħwieet li jagħmlu profitt iktar minn daqshekk.

Il-Kummissjoni tal-ħut importat in konenja kienet ta' 5%; fuq il-ħut lokali l-appellant ikkalkola gross profit ta' 12%. Il-Bord laqa' dawn l-ammonti billi ma kellux iżżejjed elementi biex jiffissa ċifra oħra. Fil-kors ta' l-appell, l-appellant kien miet.

Ex-officio assessment.
Ħanut tal-laħam.
Osta tal-ħut.

Kawża Nru. 3/1955 – Ċeduta

Kawża Nru. 4/1955 deċiża fl-10 ta' Mejju, 1955

L-appellant kien teacher, u billi kellu awmenti fid-depositi bankarji u f'investiments oħra, il-Kummissarju deherlu li l-appellant kellu xi qliegħ ieħor mhux dikjarat, illikwida l-income ex-officio.

Il-Bord wara li għamel id-debiti konteġġi, u ħa in konsiderazzjoni il-flus li l-appellant iddikjara li kellu id-dar fil-bidu tal-1948, sab awment ta' £183.19.4d li qasam f'ħames rati għal ħames snin in kwistjoni u żied dik is-somma ma' l-income dikjarat għas-snin in kwistjoni.

Awment ta' kapitali.

Kawża Nru. 5/1955 deċiża fis-7 ta' Ġunju, 1955

L-appellant irċieva £3000 bħala likwidatur ta' soċjetà. Huwa ppretenda li dawn kienu ta' natura kapitali.

Il-Bord ċaħad l-appell u osserva li l-liġi tagħna hija ġenerika biżżejjed u tikkomprendi kull xorta ta' income.

Il-Kummissarju qasam l-ammont ta' £3000, għal perijodu kollu li fih dam sejjer ix-xogħol.

Income – kull xorta ta'.

Kawża Nru. 6/1955 deċiża fit-28 ta' April, 1956

L-appellant kien wholesaler ta' oġġetti tal-ikel, u hu appella mill-assessment magħmul mill-Kummissarju għas-sena ta' stima 1949.

L-appellant ma kellux kotba tan-negozju.

Il-Bord iffissa l-profitti fuq l-oġġetti razzjonati minn diversi statements li ġew preżentati, u ffissa l-profitt ta' l-oġġetti mhux razzjonati fi 3% fuq it-turnover.

Ex-officio assessment.

Kawża Nru. 7/1955 deċiża fil-25 ta' Awissu, 1955

L-appellant kellu negozju tal-laħam, u kien jislef il-flus; huwa appella minn assessment ex-officio.

Il-Bord, ikkalkola l-awment ta' kapitali li kellu l-appellant f'£427, iddividieh binnumru ta' snin, u żied is-somma riżultanti ma' l-income dikjarat.

Assessment ex-officio.
Awment ta' kapitali.

Kawża Nru. 8/1955 deċiża fid-29 ta' Novembru, 1955

It-taxpayer kellu ħanut ta' grocer, u l-appell kien sar minn wieħed mill-eredi tiegħu. Ma kienux inżammu kotba regolari.

Il-Bord adotta ir-rati ta' profitti fissati f'każijiet preċedenti u ċioè 9% fuq oġġetti razzjonati, 10½% fuq oġġetti mhux razzjonati, inkluži birra, luminata, inbid u sigaretti, 8.7% fuq ħobż razzjonat, u 11.6% fuq il-ħalib tal-bott, dejjem fuq il-cost. L-assessment kien relativ għas-snin 1949-1951.

Ex-officio assessment.
Rati ta' profitti – bil-ħanut.

Kawża Nru. 9/1955 deċiża fl-14 ta' Novembru, 1955

It-taxpayer kellu negozju għal bejgħ tal-inbid bl-ingrossa. Għas-sena bażi 1948 huwa ddikjara profitt ta' £55, li l-Kummissarju eleva għal £1,415.

L-appellant ma kellux veri u propri kotba tal-Kummerċ, u esibixxa Trading Account u Profit & Loss Account, il-Bord iffissa l-profitti f'£888 wara li għamel l-allowance għal Wear and Tear.

Ex-officio assessment.
Negozju – bejgħ tal-inbid bl-ingrossa.

Kawża Nru. 10/1955 deċiża fil-25 ta' Awissu, 1955

It-taxpayer kien retailer ta' textiles, u appella minn ex-officio assessments.

L-appellant żamm sewwa l-kotba tal-kummerċ u l-Bord aċċetta l-introjtu dikjarat minnu, però mill-ispejjeż il-Bord qata' diversi spejjeż li kienu ta' natura kapitali.

Il-Bord osserva li t-taxpayer ma kienx intitolat għall-ispejjeż ta' car, għax ma kienx hemm bżonn ta' car għal ġeneru tan-negozju tiegħu.

Inoltri l-Bord iddikjara inamissibli t-travelling expenses mid-dar tat-taxpayer għal post tax-xogħol tiegħu.

Ex-officio assessment.
Retailer ta' textiles.
Car – bżonn ta'.
Travelling expenses.

Kawża Nru. 11/1955 deċiża fil-5 ta' April, 1955

Dan l-appell ġie dikjarat null għax il-Form "A" ġiet preżentata almenu b'jumejn ritard. Dana it-terminu huwa fatali u jimporta in-nullita ta' kwalunkwe att li jsir wara l-iskadenza tiegħu, kienet x'kienet ir-raġuni tar-ritard.

Appell – Terminu – Null.

Kawża Nru. 12/1955 deċiża fid-19 ta' Ottubru, 1955

L-appellant kien kuntrattur tal-bini, u wara rama ħanut tal-kafe u tax-xorb. Huwa ma żammx kotba jew notamenti.

Billi l-Bord ma kellux elementi biżżejjed biex fughom jillikwida l-profitti, huwa ra x'awmenti ta' kapitali kellu l-appellant fis-snin in kwistjoni, u b'dan il-mod iffissa l-income totali.

Ex-officio assessment –
Awment kapitali –

Kawża Nru. 13/1955 deċiża fis-15 ta' Ġunju, 1955

It-taxpayer kellu negozju ta' ġojellier u l-Kummissarju kien assessjalu fuq il-bażi ta' 17% gross profit fuq is-sales kif dikjarati mill-appellant.

Skond il-kotba ta' l-appellant, dan kien għamel gross profit ta' 10.27% fuq is-sales, u l-Bord aċċetta dan l-ammont għax f'dan il-kaz ċirkustanzi speċjali kienu jiġġustifikaw din ir-rata.

Ex-officio assessment.
Ġojellier.

Kawża Nru. 14/1955 deċiża fit-28 ta' April, 1955

It-taxpayer kien akkwista xi propjeta u kien qiegħed iħallas vitalizju ta' £45 fissena lill-alienanti; u ippretenda li jiddeduċi dan l-ammont.

Il-Bord ċaħad l-appell għax la darba rendita hija l-prezz tal-akkwist taqa' taħt il-projbizzjoni tal-paragrafu (c) tal-artiklu 11 tal-Income Tax Act. Inoltri il-Bord osserva li ebda deduzzjoni ma tista' ssir

mill-income meta din tkun saret a skop ta' kapital.

Vitalizju –
Spiża kapitali.

Kawża Nru. 15/1955 deċiża fit-12 ta' Mejju, 1955

Id-Ditta appellanti għas-sena 1949 bgħatet return li minnu il-Kummissarju ħareġ profitt ta' £242; wara bagħtet Balance Sheet ġdid li minnu kien jirriżulta telf ta' £134.

Il-Bord ċaħad il-pretenzjoni tal-Kummissarju li ma kienx regolari li jiġu miftuħa kotba ta' Soċjetà wara li din tiġi likwidata, u osserva li kulħadd jista' jikkoreġi żball.

F'dan il-kaz l-iżball kien ittieħed għax l-ewwel Balance Sheet kienet ġiet preparata minn skrivan ġdid li ma kienx edott bil-fatti.

Il-Bord sab li verament kien hemm telf minn negozju tal-birra, u billi dan it-telf assorbixxa l-qliegħ li s-Soċjetà kienet għamlet mil-kumplament ta' l-attività tagħha, iddeċieda li s-Soċjetà ma kellha tħallas ebda taxxa.

Korrezzjoni – ta' Balance Sheet –

Kawża Nru. 16/1955 deċiża fit-28 ta' Ottubru, 1955

Din il-kawża kellha l-istess meritu ta' dik Nru. 17/1955, billi ż-żewġ appellanti kellhom negozju wieħed bi sħab.

Il-Bord, laqa' l-appell, wara li għamel riferenza għal kawża l-oħra Nru. 17/55.

Ex-officio assessment.

Kawża Nru. 17/1955 deċiża fit-28 ta' Ottubru, 1955

It-taxpayer kellu negozju ta' blades, imwies, cutlery, armi u ġelatina, u l-Kummissarju ppretenda li l-income kien iktar middoppju ta' dak dikjarat.

Il-Bord aċċetta l-kotba preżentati mill-appellant u laqa' l-appell.

Ex-officio assessment.

Kawża Nru. 18/1955 deċiża fl-14 ta' Novembru, 1955

L-appellant kellu żewġ aġenziji tal-Lotterija Nazzjonali fis-sena bażi 1951 u ippretenda li jnaqqas bħala spejjeż 29% fuq il-kummissjoni. Il-Kummissarju kien iffissa tnaqqis ta' 12½%.

Il-Bord, wara li eżamina l-provi, iffissa tnaqqis korrispondenti għal 21% fuq il-kummissjoni.

Lotterija Nazzjonali – Aġenzija ta' – Spejjeż deduċibbli.

Kawża Nru. 19/1955 deċiża fl-14 ta' Novembru, 1955

L-appellant kellu negozju ta' drapperiji u għas-sena bażi 1951 iddikjara profitt ta' £1101, filwaqt li l-Kummissarju ppretenda li l-profitti kienu ta' £3000.

L-appellant ma żammx kotba regolari, però esibixxa lista tal-purchases, il-fatturi, notebook li fih kienu reġistrati kuljum issales, u lista li turi ġabra tal-merkanzija mibjugħa matul is-sena bil-valur tagħha.

Fuq dawn il-provi l-Bord illikwida l-profitti f'£1934.

Ex-officio assessment –
Negozju ta' drapperiji.
Kotba tan-negozju.

Kawża Nru. 20/1955 deċiża fl-14 ta' Novembru, 1955

It-taxpayer kien bi sħab mal-appellant imsemmi fil-kawża Nru. 19/1955.

Għalhekk dan l-appell kellu l-istess eżitu ta' dak Nru. 19/1955.

Kawża Nru. 22/1955 deċiża fl-4 ta' Diċembru, 1957

It-taxpayer, kuntrattur tal-bini appella minn assessment ex-officio dwar is-snin 1949, 1950, 1952 u 1953.

Il-Bord irrikostruwixxa, l-profitti u osserva: "l-approprjazzjoni tal-profitt da parti ta' soċju direttur dejjem ġiet kunsidrata bħala li ma tikkostitwiex deduzzjoni leġittima għal fini tal-income tax, billi ma saritx fil-produzzjoni ta' l-income, imma tirrigwarda rapporti interni bejn is-soċji, u wara li l-income kien ġie earned."

Approprjazzjoni da parti ta' soċju direttur.

Kawża Nru. 23/1955 deċiża fit-13 ta' Jannar, 1956

It-taxpayer, li kellu żewġ ħwienet tal-kafe, appella minn assessment ex-officio għas-snin 1949-1951.

L-appellant mhux biss ma żammx kotba imma inqas ma kien fi stat li jipproduċi kontijiet jew dokumenti oħra relattivi għan-negozju tiegħu, għalhekk il-Bord iddeċieda li l-appellant ma imexxilux jipprova li l-likwidazzjonijiet tat-taxxa magħmula mill-Kummissarju kienu eċċessivi, u ċaħad l-appell.

Assessment ex-officio.

Kawża Nru. 24/1955 deċiża fis-16 ta' Jannar, 1957

It-taxpayer kien kuntrattur tax-xogħolijiet kbar, u hu għas-sena ta' stima 1949 iddikjara profitti ta' £1000, għas-sehem tiegħu, billi ippretenda li kellu żewġ ħutu bi sħab miegħu.

Il-Kummissarju ffissa l-profitti fi £8,000, u ma aċċettax l-assert li kien hemm soċjetà bejn l-appellant u ħutu.

L-appellant ma żammx kotba u lanqas notamenti, u hu rrikostruwixxa l-kontijiet mill-memorja.

Il-Bord iddeċieda li l-profitti kienu kif likwidati mill-Kummissarju, però irritiena li l-appellant ipprova li huwa kien jaqsam in kwota ugwali ma' ħutu l-profitti.

Assessment ex-officio –
Soċjetà irregolari.

Kawża Nru. 25/1955 deċiża fil-21 ta' Diċembru, 1955

It-taxpayer appella għax il-Kummissarju ma ddeduċiex il-50% tal-profitti netti tad-Ditta "X.Y. & Co.", imħallsa lil ħu l-appellant, u mill-Kummissarju ġew kunsidrati bħala profitti esklusivi tal-appellant. (Snin ta' stima 1950-1952).

Għas-sena ta' stima 1949 l-appellant kien għamel appell identiku li kien ġie miċħud mill-Bord bid-deċiżjoni tas-17 ta' Jannar, 1953.

Il-Bord ċaħad l-appell.

Soċjetà irregolari –

Kawża Nru. 26/1955 deċiża fl-14 ta' Frar, 1956

Fir-rikors ta' l-appell, it-taxpayer semma kwistjoni li ma kienetx ġiet imsemmija fl-oġġezzjoni li hu kien għamel lil Kummissarju.

Il-Bord iddeċieda li fuq dik il-kwistjoni l-appell kien null.

L-appellant qajjem ukoll kwistjoni dwar deduzzjoni għall-insurance, imma l-Bord irreġetta l-appell, għax ma kienux ġew prodotti ebda dokumenti biex il-Bord jara jekk l-appellant jistax jibbenefika mid-dispost ta' l-art. 22(1)(d).

Objection u Appell –
Insurance – deduction.
Art. 22(1)(d) Income Tax Act, 1948

Kawża Nru. 27/1955 deċiża fis-16 ta' Frar, 1956

L-appellant, bil-ħanut ta' grocer, appella minn assessment ex-officio.

L-appellant ma żammx records; u fis-snin 1949-1953 kellu awment ta' kapitali ta' £7870. Il-Bord irritiena li dak l-awment ma setax ipproviena minn negozju ta' grocer żgħir li kellu l-appellant.

Il-Bord iffissa il-qliegħ fid-diskrezzjoni tiegħu.

Assessment ex-officio.

Kawża Nru. 28/1955 deċiżjoni preliminari tat-28 ta' Novembru, 1955

It-taxpayers talbu li jiġi deċiż li huma ma kienux dealers in securities, u sekondarjament billi l-figuri tal-profitti u perditi mill-bejgħ tat-titoli, kienu jinkludu profitti mill-bejgħ li sar fil-1947, kif ukoll dividendi u interessi dovuti qabel l-1948, u mħallsa ma' tul l-1948, oltre li ma ġewx meħuda in konsiderazzjoni l-apprezzamenti u d-deprezzamenti tat-titoli mid-data tal-akkwist sad-data meta daħlet in vigore il-liġi tal-Income Tax.

Il-Bord preliminarament iddeċieda (1) li r-risposta tal-appellat għar-rikors tal-appell ġiet preżentata fit-termini legali (tmint ijiem mid-data tan-notifika tar-rikors); (2) li r-rikors tal-appell kien null unikament

fil-parti li tirrigwarda dividendi u interessi li setgħu skadew qabel l-1948, għax dan il-pont ma kienx ġie imqajjem fl-objezzjoni.

Appell u objection –
Terminu għar-risposta tal-Kummissarju –

Deċiżjoni tat-8 ta' Novembru, 1956

Il-Bord iddeċida li l-profitt taxxabbli huwa dak li jirriżulta mid-differenza bejn il-valur tat-titoli fl-aħħar tal-1947 u l-prezz tar-rivendita jew l-ammont tar-rimbors tal-istess titoli fis-snin ta' wara.

Titoli – Securities – bejgħ ta' – kalkolu ta' profitti.

Deċiżjoni finali tal-5 ta' Marzu, 1957

B'verbal l-appellant ammetta li kien dealer f'securities u l-Bord ikkalkula l-profitti li saru fis-snin ta' stima 1949-1952.

Kawża Nru. 29/1955 deċiża fl-24 ta' Lulju, 1956

It-taxpayer kien kuntrattur tal-bini, u kien ħa l-appalt ta' bieċa xogħol kbira m'għand il-Militar; dan ix-xogħol dam sejjer minn Diċembru 1948 sa Mejju 1950. Huwa appella minn assessment ex-officio dwar is-sena ta' stima 1959.

L-appellant kien analfabeta, u l-kontijiet ġew miżmuma minn martu.

Il-Bord stabbilixxa l-profitti wara li eżamina d-diversi partiti.

Assessment ex-officio –

Case No. 30/55, and 31/55 decided on the 21st Februray, 1956

Two separate appeals were dealt with concurrently at the request of appellant, and one judgement was given for both cases.

Appellants were employed with an English Company, which had a subsidiary Company in Malta; appellants were sent to work in Malta, but their salaries and allowances were paid and credited to appellants' accounts in England.

The grounds of appeal were that taxpayers claimed that they should be taxed not on their whole salary and allowances, but only on the amounts received by them in Malta.

The Board dismissed the appeal and held that appellants' income from their employment, while serving in Malta obviously accrues in Malta, and their entire emoluments and allowances, and not only those received in Malta are taxable.

Emoluments of temporary residents.
Accrue in Malta.

Kawża Nru. 32/1955 deċiża fit-18 ta' Lulju, 1956

Din id-deċiżjoni ġiet revokata mill-Qorti ta' l-Appell (Appell Nru. 15 tal-4 ta' Diċembru, 1956) għax il-Bord kien wasal għal konklużjoni li l-appellant ma rnexxilux jipprova li l-assessment tal-Kummissarju kien eċċessiv fuq provi li ma kienux jirriżultaw mill-proċess, b'mod li l-appellant ma setgħax jagħmel l-osservazzjonijiet tiegħu dwarhom. Infatti l-Bord kien ħa in konsiderazzjoni r-rata ta' gross profit li kienet tiġi realizzata minn neguzjanti oħra, li ma kienetx tirriżulta mill-Kawża. Għalhekk kien hemm vjolazzjoni tar-"rules of natural justice".

Deċiżjoni tal-15 ta' Lulju, 1958

Il-kwistjoni kienet dwar il-profitti magħmula mill-appellant fis-sena bażi 1948. It-taxpayer kellu ġojjellerija.

Il-Bord iffissa l-profitti fid-diskrezzjoni tiegħu.

Kawża Nru. 33 deċiża fl-4 ta' Diċembru, 1957

It-taxpayer, kuntrattur tal-bini kien ħa m'għand l-Air Ministry l-appalt ta' bini ta' block bini. Ix-xogħol sar fil-1948 u l-ewwel tliet xhur tal-1949. Huwa appella minn ex-officio assessment dwar is-sena ta' stima 1949.

Il-Bord, wara li ħa in konsiderazzjoni ċ-ċirkostanzi kollha, in difett ta' provi aktar tajba, irrikorra għad-diskrezzjoni tiegħu, u kkalkula li fuq appalt ta' dan il-ġeneru l-gross profit ma setax kien ta' inqas minn 25% fuq il-cost ossija ta' 20% fuq il-valur tal-kuntratt.

Ex-officio assessment.

Kawża Nru. 34/1955 deċiża fl-24 ta' Jannar, 1956

It-taxpayer, ħaddied, appella minn assessment ex-officio għas-sena ta' stima 1950. Il-kotba miżmuma mill-appellant kienu inkompleti.

Il-Bord irrikostruixxa l-profitti mill-kwantita ta' materjal użat.

Assessment ex-officio –

Kawża Nru. 35/1955 u 36/1955 deċiżi fid-9 ta' Frar, 1956

Bil-kunsens tal-partijiet, dawn iż-żewġ appelli ġew trattati kontestwalment għax kellhom meritu identiku, u ġew deċiżi b'sentenza waħda.

B'att tal-1949 l-appellanti kienu akkwistaw l-avvjament ta' ditta li kienet timporta l-films, l-avvjament ta' azjenda ċinematografika eżerċitata f'teatru, l-mobilja u l-apparati tat-talking films eżistenti f'xi talkies. Fil-1940 huma kienu akkwistaw l-avvjament u d-dritt tal-inkwilinat ta' teatru ieħor. Issa l-appellanti ippretendew li għas-sena bażi 1948 mill-income jiġi imnaqqas d-deprezzament tal-goodwill tal-imsemmija teatri.

Il-Bord irrespinġa l-appell billi irritiena li dawk l-ispejjeż kienu ta' natura kapitali. L-ispiża kienet saret "once and for all" u ma kenitx ta' natura rikorrenti. Ma kienx ta' ostaklu għan-natura kapitali tal-ispiża, n-natura temporanja tagħha, u ċioè li l-lokazzjoni kienet għal numru ta' snin limitat.

Spejjeż – natura ta' – kapitali –

Kawża Nru. 37/1955 deċiża fit-23 ta' Diċembru, 1955

It-taxpayer kien jislef il-flus u jagħmel senseriji. L-appellant appella minn assessment ex-officio, li l-Kummissarju iffissa fuq pretiz awment ta' kapitali.

Il-Bord, wara li eżamina l-provi, sab ġustifikazzjoni tal-awment tal-kapitali, u għalhekk laqa' l-appell.

Awment ta' kapitali.

Kawża Nru. 38/1955 deċiża fit-23 ta' Jannar, 1956

It-taxpayer appella għax ippretenda deduzzjoni għall-ispejjeż ta' trasport u ta' entertainments minnu inkorsi fil-kwalita uffiċċjali tiegħu.

Il-Bord ċaħad l-appell, u osserva li fejn m'hemmx deduzzjoni espressament kontemplata mill-liġi wieħed għandu jara jekk iddeduzzjoni mitluba taqax taħt il-prinċipju ġenerali sanċit fl-art. 10(1).

L-ispejjeż inkorsi mit-taxpayer, biex imur mid-dar għal post fejn jaħdem, ma humiex deduċibbli.

Spejjeż li ma jsirux "in the actual performance of his duties" għalkemm ikunu konsegwenza tal-kariga għolja li jkun jokkupa, m'humiex deduċibbli.

Deduzzjoni – spejjeż ta' trasport –
spejjeż ta' entertainment.

Kawża Nru. 39/1955 deċiża fit-12 ta' Diċembru, 1955

It-taxpayer appella minn likwidazzjoni addizzjonali għas-sena ta' stima 1959.

It-taxpayer ippretenda li l-Kummissarju ma jistax jerġa' jagħmel likwidazzjoni ġdida fuq materja li ffurmat oġġett tal-likwidazzjoni tat-taxxa la darba ma rriżultawx items ġodda ta' income mhux imsemmija fir-return. Il-Bord b'deċiżjoni preliminari, irrespinġa din il-pretenzjoni, u osserva li l-art. 53(1) huwa konċepit f'termini vagi ħafna, u jissobordina kollox għall-opinjoni u l-ġudizzju tal-Kummissarju. F'dan il-kaz il-Kummissarju ħareġ l-additional assessment għax "the profits as declared and originally assessed were low when compared to the profits resulting from other construction works of a similar extensive nature".

Additional Assessment.
Sec. 53(1) Income Tax Act, 1948.
Konfermata fl-Appell – No. 14 tas-7 ta' Marzu, 1956.

Deċiżjoni finali tas-6 ta' Settembru, 1957

L-appellant kien kuntrattur tal-bini u l-Bord ikkalkola l-profitti wara li eżamina x-xogħol li kien sar. F'dan il-kaz il-Kummissarju kien għamel assessment addizzjonali ta' £828 u l-Bord iddeċida li kien hemm lok ta' assessment addizzjonali ta' £99.10.0d biss.

Kawża Nru. 40/1955 deċiża fit-13 ta' Marzu, 1956

Appell minn assessments ex-officio.

Preliminarjament il-Bord iddeċida li l-ispejjeż reklamati għall-benefikati minnu magħmula fil-postijiet adibiti għall-kummerċ tiegħu u minnu msejħa "alterations ta' premises" kienu ta' natura kapitali u kwindi mhux dedučibili mill-profitti. Dawn l-ispejjeż intefqu biex korp appartamenti inbiddlu f'lukanda; lukanda oħra ġiet modernizzata; inoltri kien bena restaurant fuq art li ħa on encroachment terms, u li wara żmien qasir kellu jerġa' jħott.

Dawn l-ispejjeż kienu saru mhux biss "once and for all", imma anke "with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade." "Once it is found that an asset or 'enduring advantage' has been acquired, it is immaterial that this may have only a very limited life or duration" (Hannan).

Spejjeż – natura ta' – kapitali.

Deċiżjoni finali tal-3 ta' Lulju, 1956

Il-Bord ċaħad l-appell billi irritiena li l-appellant ma wasalx biex jipprova illi l-assessments tal-Kummissarju kienu eċċessivi in konformita mad-dispost tal-art. 57(3).

Kawża Nru. 41/1955 deċiża fit-13 ta' Jannar, 1956

It-taxpayer appella għar-raġuni li l-Kummissarju kkunsidra bħala trading profit is-somma ta' £3297 derivanti mill-bejgħ ta' xi makkinarju.

Il-Bord laqa' l-appell. Dak il-makkinarju kien asset tad-ditta in kwistjoni, u t-taxpayer ma kienx jinnegozja wkoll fil-permanent assets tad-Ditta tiegħu. Għalhekk il-profitti derivanti mill-bejgħ kien capital profit.

Capital profit –
Permanent assets – bejgħ ta'.

Kawża Nru. 42/1955 deċiża fil-5 ta' Jannar, 1956

It-taxpayer appella għar-raġuni li l-Kummissarju ma għamillu ebda deduzzjoni mill-income tiegħu għall-esawriment tal-barriera minnu maħduma.

Il-Bord ċaħad l-appell.

L-appellant ried jiddeduċi s-somma erogata fl-akkwist tal-barriera. Din ma kienetx rikorrenti u kienet "to bring into existence an asset" u għalhekk kienet ta' natura kapitali. L-Art. 11(c) jipprojbixxi mhux biss l-ispejjeż ta' natura kapitali imma kull eżawriment ta' kapital li huwa proprju l-kaz tal-appellant.

L-artiklu 10(1) għandu jinqara ma' l-art. 11.

Spejjeż – natura ta' – kapitali –
Barriera – spejjeż ta' akkwist ta' –
Art. 10, 11 Income Tax Act, 1948.

Kawża Nru. 43/1955 deċiża fl-29 ta' Marzu, 1956

It-taxpayer appella mill-likwidazzjoni tat-taxxa. F'dan il-kaz il-Kummissarju fuq l-istatements tal-appellant illikwida income id-doppju ta' dak dikjarat. Wara l-appellant qal li dak il-profitt kien ta' xogħol li sar qabel l-1948. Però ma ngiebux provi.

Il-Bord ċaħad l-appell għax l-appellant ma pprovax li l-likwidazzjoni tal-Kummissarju kienet eċċessiva.

Prova – oneru ta'.

Kawża Nru. 44/1955 deċiża fit-13 ta' Marzu, 1956

It-taxpayer appella mill-likwidazzjoni tat-taxxa għas-snin ta' stima 1949, 1950, u 1951 billi dehrlu li kienu eċċessivi.

Il-Bord ikkalkola l-awment tal-assets minn sena għall-oħra u magħhom żied in-"net income" ta' kull sena provenienti mhux minn negozju u l-ispejjeż minfuqa għal familja, u b'hekk iffissa l-income ta' kull sena.

Ex-officio assessment –
Awment ta' kapitali –

Kawża Nru. 45/1955 deċiża fis-26 ta' Jannar, 1956

Il-Bord iddeċieda prelimarjament:

(1) li huma dedučibbli d-debiti li jkunu

saru "bad" fis-sena antecedenti ghal dik tal-istima, anke jekk il-frutti taghhom ma jkunux gew "brought to charge" taht il-ligi tal-Income Tax;

(2) li mhumiex deducibbli dawk id-djun li saru bad qabel il-1948;

(3) li hija rilevanti d-data ta' meta l-kreditu sar inesigibbli, u mhux meta l-kreditur jiddeciedi li d-dejn ghandu jigi "written off".

Bad debts – deduzzjoni ghal –

Decizjoni tat-18 ta' Settembru, 1956

Il-Bord iddecida li d-decizjoni tal-Kummissarju dwar l-inesigibilita u d-data tal-inesigibilita tal-krediti reklamati mill-appellant bhala bad debts, mhix soggetta ghar-revizjoni ta' dan il-Bord. (Art. 10(1)(e)).

Decizjoni tal-Kummissarju – Insindakabilita.
Art. 10(1)(e)

Decizjoni finali tal-25 ta' Mejju, 1957

Il-Bord iddecieda li fil-profitti tas-sena ta' stima 1950 ghandha tidhol is-somma derivanti mill-bejgh ta' foreign currency inkluza wkoll il-Kummissjoni tal-Bank, kif riportata fil-Profit and Loss Account tas-sena 1949. Fil-profitti huma inkluzi dak li jkun qala', imhabba l-izvalutazzjoni ta' l-isterlina, fuq il-foreign currency li jkun jippossjedi.

Foreign currency – svalutazzjoni ta' l-isterlina.

Kawza Nru. 45/1955 deciza fid-29 ta' Dicembru, 1955

It-taxpayer kien spettur sanitarju u kellu agenzija tal-lotterija. Il-Kummissarju zied ma' l-income l-awment tal-kapitali li kellu t-taxpayer fis-snin in kwistjoni.

L-appellant spjega l-awment ta' kapitali; dan kien dovut ghal fatt li hu kien jghix mal-genituri ta' martu, kera u hajja franka; ghalhekk l-awment ta' kapitali kien gustifikat, u l-Bord laqa' l-appell u ddikjara li l-awmenti fil-kapital ma ghandux jigi kunsidrat bhala income, ghax kien tfaddil mill-istess income, u ordna "re-assessment" fuq din il-bazi.

Awment ta' kapital – gustifikat.

Kawza Nru. 47/1955 deciza fit-2 ta' Frar, 1956

It-taxpayer, li kellu barriera u xi depoziti fruttiferi fil-Banek, iddikjara income ta' xi £240 fis-sena, ghas-snin 1949-1954. Il-Kummissarju llikwida l-income f'£550, billi deherlu li kien awment hemm ta' £1,500 fil-kapitali.

Il-Bord sab gustifikazzjoni tal-awment tal-kapital, u laqa' l-appell.

Awment ta' kapital.

Kawza Nru 48/1955 deciza fit-3 ta' Ottubru, 1956

It-taxpayer kellu xi hwienet ghal bejgh tad-drappijiet, u Ibies tan-nisa, u appella minn ex-officio assessment.

Il-Bord osserva li l-merkanzija kienet giet sopravalutata u b'hekk it-telf li l-appellant kien sofra qabel il-1948 gie mitfugh fuq il-hwienet tieghu.

Dwar it-travelling expenses il-Bord osserva li l-ammont ammissibbli ghandu jkun ristrett ghal dak li hu strettament necessarju ghan-negozju.

F'dan il-kaz ma kienx hemm bzonn ixxiri ta' motor car ghal fini tan-negozju tal-appellant, u kwindi ma kienx hemm lok ghad-deprezzament ghal wear and tear. Billi pero il-car intuza minflok mezzi ohra ta' trasport kien xieraq li ssir allowance ghall-uzu tieghu u l-Bord ammetta spiza ta' £50 ghal dan l-iskop.

Dwar il-krediti inesigibbli l-Bord irriserva d-decizjoni dwar id-deduzzjoni taghhom ghad-diskrezzjoni tal-Kummissarju.

Ex-officio assessment –
Sopravalutazzjoni tal-merkanzija.
Travelling expenses.
Motor car –
Krediti inesigibbli.

Kawza Nru. 49/1955 deciza fl-4 ta' Lulju, 1956

It-taxpayer kellu ditta ta' Wines & Spir-

its Merchants, u hu appella minn ex-officio assessment.

Il-Bord iffissa l-profitti billi stabbilixxa l-awment ta' kapitali fl-aħħar ta' kull sena, u żied dak li l-appellant kien jieħu għal ħajja.

Assessment ex-officio –
Awment ta' kapitali.

Kawża Nru. 50/1955 deċiża fil-25 ta' Mejju, 1956

Appell ta' ħajjata minn assessment ex-officio.

Il-kotba kienu irregolari, però l-appellanti kkonfermat bil-ġurament li hi niżżlet fihom dak kollu li daħħlet u nefqet, u għalhekk il-Bord laqa' l-appell.

Assessment ex-officio –

Kawża Nru. 51/1955 deċiża fis-16 ta' Frar, 1956

It-taxpayer kellu negozju bl-ingrossa tad-drapperiji.

Il-Bord irritiena li d-deprezzament talistock in trade għandu jittieħed in konsiderazzjoni fis-sena li fiha effettivament javvera ruħu u konsegwentement kwalunkwe deprezzament li seta' ssuċċeda qabel l-1 ta' Jannar, 1951 ma jistax jittieħed filkalkolu tal-profitti għas-sena ta' stima 1952.

Il-Bord iffissa d-deprezzament u l-profitti.

Deprezzament –

Kawża Nru. 52/1955 deċiża fl-14 ta' Settembru, 1956

Il-Bord aċċetta l-income kif dikjarat mittaxpayer kuntrattur.

F'dan il-kaz l-awmenti ta' kapitali, pretiżi mill-Kummissarju, kienu ġustifati, u fis-snin in kwistjoni, l-appellant għamel perjodi twal marid.

Assessment ex-officio –
Awment ta' kapitali –

INDIĊI

tad-deċiżjonijiet tal-Bord ta' Kummissarju Speċjali tat-taxxi.
(Kumpilat minn M. Frendo u C. De Battista)

INDIĊI

ta' artikoli tal-liġi ta' l-Income Tax 1948 msemmijin

MARRIAGE CONTRACTS

Regulating the Patrimonial Regime of the Family
The Position under Italian Law

DAVID SCICLUNA

THE specific object of the marriage contract is that of establishing the patrimonial or property regime which is to govern the relations between husband and wife. It is favourably looked upon by positive law, which grants to the parties the liberty to regulate their relations in the way which is more convenient to them and dispenses them from certain legal conditions.

Italian law as it stands today deals with the patrimonial regime of the family in Chapter VI of Title VI of Book I of the Civil Code. The first article of this Chapter (art. 159) declares that the patrimonial relationships between the spouses are regulated (i) by those agreements ('convenzioni') into which the parties have entered, and (ii) by the law. The contents of these matrimonial agreements can be freely fixed by the parties, so long as they are destined to regulate the patrimonial situation of the spouses during marriage, so that even donations in contemplation of marriage can form the object of such an agreement (art. 785). Hence the Italian Courts have also considered as a valid matrimonial convention that in which the parents of the spouses promise to provide for the patrimonial interests of the new family (Corte di Cassazione, 7 February, 1952).

Matrimonial conventions or marriage contracts, however, are not too frequent. In fact, in many regions in Italy it is today rare to come across stipulations of solemn nuptial pacts dealing either with the traditional institute of dowry or the more recent creation of the family patrimony ('patrimonio familiare') which has scarcely entered into practice. Rather there exists a *legal regime* consisting of the separation of goods ('separazione dei beni'). The husband may do what he wants with his patrimony and the wife retains full autonomy over her own personal goods, saving her obligation to contribute to the expenses of marriage. Nevertheless, it is a fact that the husband still often administers his wife's goods, even without an express stipulation to that effect. In such an eventuality and so as to safeguard the wife's rights, the law provides that the husband is subject to the obligations of a usufructuary (art. 213); if, as usually happens, the husband has enjoyed his wife's goods without a 'procura' and without any written opposition on her part, he is bound, on the dissolution of the marriage, to give up merely those fruits still in existence (art. 212).

But as regards the conventional regimes, the law is still in force and is in some respects similar to and in others completely different from ours dealing with marriage contracts. Thus, the spouses, in their marriage contract, cannot derogate any of the rights due to the head of the family, nor any rights as the law attributes to either of the spouses (art. 160). No mention is made, as in our section 1282, of tutorship, minority, emancipation of children, or prohibitory rules of law, derogation from the rules of which is forbidden. Noteable also is the absence of any norm stipulating that agreements whereby all or some of the children are to be brought up in the mother's religion are valid. But then follows a general principle that the spouses cannot agree in a generic way that their patrimonial relationships are to be regulated wholly or in part by laws to which they are not subject or by usage, but must declare in a concrete manner the contents of the agreements by which they intend to regulate their relations (art. 161).

Marriage agreements must be stipulated by public deed, under pain of nullity. They CANNOT be AMENDED after the celebration

of the marriage, though the modification may be more favourable, but CAN be STIPULATED after the celebration of the marriage *in such cases as the law contemplates, provided they do not alter marriage agreements already established* (art. 162), and in such instance the presence of both spouses is not essential. The cases contemplated by the law relate to the constitution of a family patrimony (art. 167), the constitution of a dowry (art. 178) and the constitution of a community of profits and acquisitions (art. 215).

Our law (s. 1288(1)) allows variations to be made even after marriage provided that the spouses have the authority of the Court and without any prejudice to the rights of the children or of third parties, and provided also that such variations are made in a public deed (s. 1289) and registered in the Public Registry (s. 1290), the notary having also to draw up a note of reference (s. 1291).

When amendments to marriage contracts are made *before* marriage, the Italian position is that they have no effect unless they are stipulated by a public deed in the presence and with the simultaneous consent of all persons who were parties to the marriage contract (art. 163); so too under our law (s. 1287). However, any amendment is without effect with respect to third persons unless a notation referring to the deed containing the amendment is made on the margin of the original marriage contract. The notation is to be made on the copy of the marriage contract filed in the public archives by the notary who received it and also on the copy submitted for transcription, if the marriage contract has been transcribed (art. 163), which it must be if dealing with immovables.

No proof of simulation in marriage agreements is admissible, even if such proof is shown by written counterdeclarations. These counterdeclarations can have effect *only* as to those between whom they take place and only if made in the presence and with the simultaneous consent of all persons who were parties to the marriage contract (art. 164). No such limited effect is apparent under our law.

As regards *capacity*, the traditional rule 'habilis ad nuptias, habilis ad pacta nuptialia' is not always followed today and the minor must generally be assisted by the same persons who consent to his marriage, i.e. by the parent exercising paternal authority, the guardian, the curator in the case of an emancipated minor, or the special curator appointed purposely to assist the minor in drawing up the marriage agreements (art. 165). With regard to disabled persons, the assistance of the curator previously appointed is necessary for the validity of stipulations and donations made in the marriage contract by such a disabled person or by a person against whom an action for a declaration of disability has been instituted (art. 166). Under our law, marriage agreements entered into by minors (where the father is absent, dead, interdicted, or of unsound mind) or by disabled persons are to be authorised by the Court.

Italian law provides for three regimes that can be set up by marriage agreements. These three regimes have already been referred to but it is fitting to discuss them briefly. They are: a family patrimony, a dowry and a community of acquests.

The constitution of a family patrimony aims at securing to the family certain specified immovable property or negotiable instruments ('titoli di credito') which are thereby rendered inalienable and rendering any fruits the immediate property and enjoyment of the family. This patrimony can be constituted even during marriage by one or both spouses or by a third party who, however, is entitled to retain ownership of the goods. The administration of this property lies with the spouse to whom it belongs. If the property belongs to both spouses or to a third person the administration will lie with the designated spouse and in lack of such designation, with the husband. The family patrimony is dissolved on the dissolution of marriage though if, on the death of one spouse, there are children, the bond remains till the last child at-

tains majority.

The constitution of a doury has today lost much of its importance, mainly because of the negative consequences deriving from the inalienability of the goods forming the object of the dowry, i.e. such property as the wife or others on her behalf brings expressly as dowry to the husband to sustain the burdens of marriage. One must here point out that constituting a dowry by will is considered as null under Italian law. From this I submit that one can imply that even a renunciation of succession in return for a dowry or donation in contemplation of marriage (an agreement permitted under our law by s. 1284(2)) would be invalid. In fact, article 458 of the Italian Civil Code expressly lays down that 'Any agreement by which one disposes of his own succession is void' and further that 'Any act by which one disposes of the rights that can belong to him by a succession not yet opened, or renounces such right, is equally void'. That this applies even to marriage contracts is clear from what the Corte di Cassazione said on the 22nd May 1959 that: 'Patti successori vietati dalla legge' comprendono 'anche ogni convenzione che abbia per oggetto di costituire, modificare, trasmettere o estinguere diritti relativi a una successione non ancora aperta.'

And while on succession, as regards the varying of the legal order of succession which is dealt with by section 1283 of our Civil Code and which provides for its invalidity, the fact that no mention of it is made in Italian law under the Chapter dealing with 'Marriage Contracts' would also render it invalid, and this in accordance with general principles. Besides, with regard to such promises made in marriage contracts as are mentioned by our law in section 1284(1)(a), (b) and (c)* and which are thereby declared valid, the fact that are not expressly or otherwise listed under the aforesaid Chapter would also render them invalid.

Finally, the last regime that can be established by the spouses is *the community of acquests* which is an institution seldom put into practice in Italy, unlike our law where it automatically takes effect when the marriage is celebrated. The community consists of the enjoyment of present and future goods of the spouses and such property as is acquired during marriage under any title, except through donation, heredity or legacy. Administration vests with the husband who can even alienate goods in the community so long as he does so by onerous title. Once the community is dissolved, the goods contained in it are divided equally between the spouses, saving the relevant 'prelevamenti' or any different proportions that may have been established in the matrimonial agreements.

To conclude I must point out that in Italy, legislation is being prepared to bring about far-reaching changes in connection with the patrimonial regime of the family. Thus, the concept of the husband as the sole bread-winner of the family – already somewhat varied by the wife's Constitutional right to work – may, in the near future, be further relegated by certain provisions whereby the wife may in certain cases be obliged to work. Moreover, various innovations as regards the economic government of the family are also foreseeable.

* 1284(1) A promise made in a marriage contract by the parent of one of the future spouses to such future spouse –

(a) not to leave to such future spouse out of his or her estate a portion smaller than that which such future spouse would take on an intestacy, or

(b) not to diminish such portion by any donation in favour of his or her other children or of any other person, or

(c) not to give or leave, by donation or will, to any of his or her other children more than that which he or she would give or leave to such future spouse, shall be valid.

THE ROLE OF THE NOTARY PUBLIC IN HISTORY

TONIO SPITERI, B.A., LL.D.

ARISTOTLE, writing over three hundred years before Christ, affirms that: 'no state can exist at all in the absence of those offices which are absolutely indispensable; no properly governed state can exist in the absence of those which ensure good organisation and order'.[1] Amongst these indispensable offices this great philosopher includes that required for the registration of private contracts and judicial decisions.

It is evident that the members of every civilised society have from time immemorial entered into binding agreements or contracts with one another, in their day to day transactions. Originally, most of these agreements were concluded in the oral form, but with the introduction of various methods of writing and their accessibility to the more learned members of society, it became necessary to commit such agreements to writing, so as to ensure their authenticity and their preservation in a stable and permanent form. The more progressive and sophisticated societies gradually developed a system of registration of private agreements and therefore, it comes as no surprise to us that in ancient Greece, the birth place of modern civilisation, there existed a public official who was specifically entrusted with the task of receiving and registering private contracts, an office which is not inconsistent with that of the Notary Public.

The position in ancient Rome presented a totally different view. Under the Republic the 'tabularii', also known as 'notarii' were no more than educated slaves, whose job was, in more ways than one, similar to that of the modern stenographer. One of their tasks was to write down in shorthand (and hence the word 'notarius') the speeches and orations of the consuls, magistrates, generals and of any other wealthy Roman who required their services.

Gradually, the functions of the 'tabularii' or 'notarii' were altered to a considerable extent. They became public employees – 'tabellarius sive tabellius scriba publicus' – working at the offices of the censors as clerks and archivists and were responsible 'inter alia' for the safe keeping of public records, contracts and wills.

With the diffusion of the art of writing amongst the Roman population, it was felt necessary to record in the written form the more important events of civil life. No one was better suited to such a task than the 'tabularii' or 'notarii'. These became renowned for the speed and expertise with which they drew up their conventions or agreements, which fact earned them the title of 'cursores'. This they achieved through the invention of an elaborate system of signs and abbreviations, known as 'signes'.

The services of the 'notarii' became more and more in demand especially in Court circles, members of the profession being ultimately chosen as secretaries to the Emperor (and were later on to be called 'cancellieri').

By the end of the fourth century A.D. the 'notarii' had been progressively moulded into a shape which resembles to a large extent that of the present day notary, though they never acquired the status of a public officer. Indeed, they became the only persons competent to draw up wills, codicils, public deeds and private agreements.

Justinian confirmed the existence of the Notarial Profession by legislating specifically in its regard; he raised the status of the Notary to an esteemed position by treating it with the dignity and respect it so well deserved and he also recognised the burdens and responsibilities which were particular to every single notary, and

[1] Aristotle: 'Politics' Bk. VI, Chap. 8 (translated by Ernest Barker in 'The Politics of Aristotle')

which necessarily arose out of the exercise of his profession.

With the fall of the Roman Empire, the Italian peninsula was divided into two great zones, the southern sector retaining close political ties with the Byzantine Empire and the northern sector falling under Lombard domination. In the former territoty, it was the 'tabelliones' who prevailed and ultimately survived in the form of 'scrivani urbis', while, in the territory under Lombard domination, one comes across 'pubblici notarii', clerks working in a private capacity, though endowed with state recognition.

Lombard legislation in this field was rather sporadic and certainly not as extensive as its Roman counterpart, but still, it was by no means non-existent. The earliest and indeed most fundamental edict was that of Rotari, aimed at suppressing the forgery of deeds which, in those days, was of common occurrence. This Edict prescribed so severe a punishment, on any scribe found guilty of uttering a false document, as to make it impossible for him to commit the same offence twice:

'Si quis chartam falsam scriperit, aut quodlibet membranum, manus euis incidatur'.

In the Middle Ages, the position remained somewhat at a standstill. The 'tabelliones' continued to perform strictly notarial duties and to constitute their own colleges headed by a 'proto tabellio' or 'primicerius'. On the other hand, the word 'notarii' was primarily attributed to the secretaries and accountants attached to the Imperial Court, to the Holy See or even to the Communes. Thus, one often comes across 'notarii imperiali auctoritate' (nominated by the Emperor) and 'notarii apostolici' (those nominated by the Church).

The notarial profession, in its modern connotation, may have been introduced in Malta by the Normans, probably late into the eleventh or early in the twelfth century, though this is more conjecture than fact due to the legal obscurity of this period and to the lack of primary sources. Nevertheless, during this early period a number of 'notarii' were known to attend the sittings of the 'Università' (or Consiglio Popolare as it was more commonly known). Their principal task was to render an annual account of the legal situation existing in these Islands to the Magna Curia. For instance, in Gianbruno[2] one finds recorded the name of Notary Angelu di Manueli, who, in July 1439, was sent to the Court of Sicily, as ambassador of the Università, to present a number of 'capitoli' for the approval of the Sovereign.

Unfortunately, however, no notarial act has survived prior to the middle of the fifteenth century, which might have thrown some light on the status of the profession as it existed in our Islands in those times. In fact, the earliest notarial acts which are extant are probably those of Notary Paolo Bonello who exercised his profession between 1467 and 1517.

It appears that, up to the fifth decade of the domination of the Knights of St. John, a number of clerics, notably parish priests, had acquired by custom the faculty of performing certain functions pertaining to the notarial profession, such as the drawing up of marriage contracts. This was considered an abuse by the Church authorities. So much so, that when Mons. Duzzina paid his Apostolic visit to these Islands in 1575, he warned the local parish priests, in the strongest possible terms, to desist from those activities which were their office 'sub poena suspensionis et aliis poenis arbitris euisdem Domini Ordinarii medesimi'.[3]

Maltese Notarial Legislation

Proper legislation regulating the rights, functions and responsibilities of members of the notarial profession was only introduced into the Island after the arrival of the Knights, though notaries previously

[2] Gianbruno e L. Genuardi: 'Città Demaniali di Sicilia'

[3] M.S. 643; R.M.L.; 'Visitatio Apostolica' Duzzinae

employed by the Order in Rhodes had been governed by a notarial law, entitled 'De notariis et eorum salariis', which was enacted by Grand Master Fra Enrico d'Ambrosiere in 1509.[4]

Nevertheless during the earlier period of the Knights' domination, any legislation in this particular field of law was sporadic, confused and superficial and indeed, it was only with the publication of the 'Leggi Prammaticali' of Grand Master Lascaris in 1640 that a somewhat orderly and comprehensive legislation was introduced.

Still, it would not be amiss to give a cursory glance at some early attempts at legislating in this sphere of law which are particularly interesting from a historical point of view, though they are of a doubtful legal value.

The ball was set rolling as early as 1553 with the Promulgation of the 'Pandectae et Ordinationes' by Grand Master D'Homedes,[5] which more or less consist in a compilation of a set of rules regulating the tariffs due to members of the legal professions. The fifth chapter, entitled 'Iura Notariorum' deals fully with the fees payable to notaries, as well as the manner in which they may be computed.

Forty years later, Grand Master Hugo Lonbeaux de Verdale (1582-1595) enacted a codification of the existing laws with numerous amendments and innovations, entitled 'Statuta et Ordinationes', wherein is included a somewhat short title called 'De Tabellionibus.'[6]

Of particular interest is the second section which refers to the 'Recognoscendi contrahentibus per notarios'. In fact, this was the first occasion when our legislator thought it fit to lay down that, on pain of deprivation of office, the notary should declare in the deed that he is personally aware of the identity of the contracting parties.

With Verdale ended the first phase of notarial legislation and a new era thereafter commenced with the promulgation of the 'Leggi Prammaticali' of Grand Master Jean Paul Lascaris Castellar (1636-1657) on the first of March, 1640.[7] The Prammatiche are divided into eighteen titles, each being further subdivided into chapters. The chapter entitled 'De Tabellionibus' which deals with the office of notaries undoubtedly shows a marked improvement both on the 'Pandectae' of D'Homedes and on the 'Statuta' of Verdale, even though the provisions contained in the latter two codes proved to be the primary source of Lascaris' legislation.

After the 'Prammatiche' of Lascaris, we find yet another compilation of 'Prammatiche' this time published by Grand Master Gregorio Caraffa (1680-1690) on the eleventh of September 1681.[8] Chapter ten, entitled 'De Notari Publici', deals with public notaries, archivists and obligations 'ex contractu'. It also contains a number of important innovations one of which lays down the basic requirements a notary was expected to have to be allowed to exercise the profession. The more important of these requirements were an age limit of twenty five years (now repealed by Act XXX of 1973), a sound character, sufficient means (at least a minimum of 500 scudi) a continuous apprenticeship with a notary for a period of five years and a final examination.

With the Grand Mastership of Antonio Manoel De Vilhena (1722-1736) commences the last phase of notarial legislation under the Order. This was an era which experienced the publication of two great codes of law namely the 'Leggi e Costituzioni Prammaticali' of Vilhena and the 'Diritto Municipale di Malta' of Grand Master De Rohan.

[4] M.S. 704; R.M.L.
[5] M.S. 439. R.M.L.
[6] M.S. 704. R.M.L.
[7] M.SS. 148 and 152, R.M.L.: 'Leggi Prammaticali pubblicate l'anno 1640 per comando del Ser. Principe Fra Gio. Paolo Lascaris Castellar'.
[8] M.S. 151, R.M.L. 'Costituzioni Prammaticali Ordinate dal Sermo Gregorio Carafa, 11 Settembre 1681'.

The former code, published in 1723 was the work of an Italian Abbate Paccarotti, though most of its twenty-nine titles were culled directly from Caraffa's 'Prammatiche' and from the 'Consolato di Mare di Malta' of Perellos. However, title eleven which deals with 'Notarii' and 'Archiviari' may be considered an innovation in its field for it was by far the most complete and orderly notarial legislation enacted in the Island up to this period.

Notarial legislation under the order culminated in the 'Diritto Municipale di Malta' commonly known as the 'Code de Rohan.' It was first published on the seventeenth July, 1784 and consists of seven titles, each of which is further subdivided into chapters.

Chapter 41 of the First Title is dedicated to the 'Notari Publici e Stipulanti' and it deals extensively with the fundamental duties and responsibilities of notaries as well as the manner in which public deeds and wills are to be properly drawn up and preserved.

The provisions governing the exercise of the notarial profession found in the 'Code de Rohan' remained in force throughout the first half of the nineteenth century. However, the legal improvements which were effected in other spheres of Maltese law rendered, by comparison, such provisions obsolete and indeed these were soon felt to be inadequate to cater for the needs of a rapidly expanding profession.

The badly needed reform was eventually brought about by the Promulgation of Ordinance V of 1855, which radically abrogated the relative provisions of the 'Code de Rohan' and substituted them by more detailed and scientific legislation largely based on the notarial laws which had been enacted in a number of European countries earlier on in the century with special reference to the French Notarial Law of the twelfth August, 1902.

Nevertheless, although this Ordinance had been called by Count Caruana Gatto 'una meraviglia per quei tempi'[9] the exigencies of a rapidly developing Maltese society were soon to render necessary a number of modifications and ameliorations to Ordinance V of 1855. In fact, the draft of the notarial law now in force in these Islands was originally submitted to the Legislative Assembly on the first of June 1922, but subsequent prorogations of the Assembly each time brought about the fall of the said draft.

A final successful attempt to pass the act was made on the ninth November 1925 by the Hon. Prof. Mallia. The draft was subsequently approved at its third reading on the eighth of March 1926. The 'Notarial Profession and Notarial Archives Act', then, became law by Act XI of 1927, now Chapter 92 of the Revised Edition of the Laws of Malta.

[9] Parliamentary Debates (1921-1922) Part II, Vol. II, Pg. 2336.